United States Court of Appeals for the Second Circuit



APPENDIX

75-2146

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 75-2146

UNITED STATES OF AMERICA ex rel. EDWARD H. HARNED, JR.,

Petitioner-Appellant,

-against-

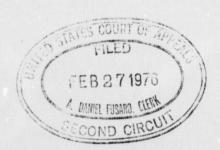
ROBERT J. HENDARSON, Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

Appeal from Orders and Judgment of the United States District Court for the Eastern District of New York

APPENDIX

JEFFREY IRA ZUCKERMAN
Attorney for Appellant
48 Wall Street
New York, New York 10005
(212) 952-8100





PAGINATION AS IN ORIGINAL COPY

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Exhibit A

730 1103 u.s.a. ex rel. EDWARD H. HARNED, JR. vs. HENDERSON, SUPERINTENDEN

ATE FILINGS—PROCEEDINGS	
	AMOU REPORTI EMOLUN RETUR
3-73 PETITION FILED FOR A WRIT OF HABEAS CORPUS	1.
-73 MOTION FILED TO PROCEED IN FORMA PAUPERIS	2 (
73 Letter of relator herein filed dated July 17, 1973 re minutes,	etc. 3
-73 Minutes of Plea of Guilty, dated June 23, 1971 filed. (copy)	4
-73 Minutes dated Dec. 2, 1969 (Copy County of Nassau, Mineola) filed.	. 5
-73 Minutes dated October 29, 1971 (Copy) County Court; Nassau	6
County Part VI, filed.	
3-73 Memorandum filed in support of Writ, etc.	7
-73 BY JUDD, J. ORDER TO SHOW CAUSE FILED (1) The Atty., Gen., Stat	
of N.Y., to show cause why a writ of habeas corpus should not be issued, etc. (See Order) 5-73 Copy of letter of Clerk of Court filed dated July 25, 1973	9
re enclosure of a copy of order, etc.	
0/73 Letter dated 8/30/73 from Edward Harned, Jr. filed. re: ob-	
jecting to extension of time granted respondent to answer	10
0-73 BY JUDD, J. ORDER filed extending respondent's time to file	11
his opposition to petitioner's application, etc., to Sept. 24	1973.
(P/C mailed to Atty., Gen., State of N.Y., att; JOEL LEWITTES, E	
9-73 Letter of relator herein filed dated Sept. 11, 1973 addressed to	
Judd, J.	
21-73 Affidavit of Iris A. Steel in opposition to petition for a	
writ of habeas corpus.	13
5-73 Affidavit of EDWARD H. HARNED, petitioner, filed.	14
2-74 Letter of relator herein filed dated Feb. 20,1974 re reply	15
to The Atty., Gen., State of N.Y., etc.	
26-74 BY JUDD, J. MEMORANDUM and ORDER FILED. ORDERED that the peti	ion
be DISMISSED for failure to exhaust state remedies, without	16
prejudice to renewal if further post-conviction proceedings in courts of New York State are unsuccessful. (See Memo., etc.)	-the
Copy of Memo., etc., was on this day mailed to relator; to	
Assistant Atty., Gen., Iris A. Steel: to Rureau of National	
Affairs, etc., by the secretary to JUDD, J.	17
APPLICATION FILED FOR RENEWAL.	
-75 APPLICATION FILED FOR RENEWAL75 APPLICATION FILED FOR BAIL.	18
APPLICATION FILED FOR RENEWAL. APPLICATION FILED FOR BAIL. Before JUDD, J. Case called. Marked submitted. DECISION RESERV	ED.
-75 APPLICATION FILED FOR RENEWAL75 APPLICATION FILED FOR BAIL.	ED.

U.S.A. ex rel. EDWARD H. HARNED, JR. vs. R.J. HENDERSON,

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DATE	FILINGS—PROCEEDINGS			K'S FEES		REFORTE EMOLUM	
	••	PLAINTIFF		DEFENDANT		RETUR	
L-75	Affidavit of EDWARD H. HARNED, JR., filed			20			
-75	By JUDD, JMEMORANDUM AND ORDER dtd 6-23-75					that	
	petitioner's motion for release on bail be der	ied,	and	that	_		
	Harold Schwartz be disignated as attorney for copy 4 - Voucher re(payment), mailed to Ac	plti	•		-	16	
14-75		mini	SLIC	LIVE	M	West -	
	Office, etc.				<u> </u>		
4-75	Copy 5 (appointment voucher filed.)			22	i -	 	
2-75	Petitioner's brief filed.	ļ		23	-	-	
75	Memorandum of Law in Opposition to Petitioner	's Ap	pli		<u>n</u>	-	
	for a Writ of Habeas Corpus filed.	<u> </u>	<u></u>	24	_	1	
7/75	By JUDD, J Memorandum and Order dated 10/16/				-		
	that the petition be dismissed. PC. mailed to	the	att	ys.	-		
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-6-75 -6-75	By JUDD, JCERTIFICATE pursuant to Rule 22(b)	dtd 1	1-5	75	\perp		
	Application for certificate of probable cause By JUDD J -CERTIFICATE pursuant to Rule 22(b) that there is a probable cause to justified. (Copy of certificate mailed to petition)	ner)	PP	(mg)	_	1	
/75	NOTICE OF APPEAL FILED . Duplicate of Notice	of Ap	pea	1 mai	led		
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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel. EDWARD H. HARNED, JR., TIME A.M......

Petitioner,

JUDGMENT

- against -

73 C 1103

R. J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent.

M'FILMED

A memorandum and order of the Honorable Orrin G. Judd, United States District Judge, having been filed on October 17, 1975, dismissing the petition for a writ of habeas corpus, it is

ORDERED and ADJUDGED that the

petitioner take nothing and that the petition is dismissed.

Dated: Brooklyn, New York October /7 , 1975

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FILED

UNITED STATES DISTRICT COURTERS EASTERN DISTRICT OF NEW YORK

JUN 2 1974

THAE A.M.....

UNITED STATES OF AMERICA ex rel. EDWARD H. HARNED, JR.,

73-C-1103

petitioner,

M' FILMED

- against -

HON. R.J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

June 26, 1974

Respondent.

Submitted by:

EDWARD H. HARNED, JR. petitioner, Pro se

Appearance:

HON. LOUIS J. LEFKOWITZ
Attorney General, State of New York
Attorney for Respondent

By: IRIS A. STEEL, ESQ.
Assistant Attorney General
of Counsel

JUDD, J.

MEMORANDUM AND ORDER

petitioner, in state custody under a ten-year sentence for barglary in the first degree, seeks a federal writ of habeas corpus.

PPI-68-3-17-72-30M-0133

ExhibitC

Facts

petitioner was indicted in January 1970 for rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, and assault in the second degree. The alleged victim had filed her complaint in November 1969, and was examined at a felony hearing held on December 2, 1969, and cross-examined by defense counsel. Defendant was released on \$2,500 bail, and remained at large, without being tried, until his arrest in January 1971, on a second rape charge.

The first indictment was on Judge Altimari's conference calendar on February 17, 1971, after other conferences in 1970 before a different judge. It was marked, "Conference, possible disposition, 2/25/71."

petitioner was indicted again on March 9, 1971

for rape in the first degree, burglary in the first degree,
and possession of burglar's tools. The second indictment
involved a second incident, on January 16, 1971, involving
a different complainant. Petitioner waived a felony hearing
and was remanded to the Nassau County Jail. On June 23,

1971, petitioner as defendant on the second indictment,
pleaded guilty to burglary in the first degree. On June 30,

1971, before sentence was imposed, he wrote to Frank X.

Altimari, Nassau County Court Judge, asking to withdraw his guilty plea and asserting that it was caused by his extended incarceration and the coercion of his weeping mother and his terminally ill father.

A hearing on the motion to withdraw the guilty plea was had on October 29, 1971, and the motion was denied with an opinion dated December 23, 1971. Sentence was imposed on January 7, 1972. On appeal from the judgment of conviction, the Appellate Division affirmed the conviction.

People v. Harned, 40 A.D.2d 952, 337 N.Y.S.2d 995 (2d Dept. 1972). Leave to appeal to the New York Court of Appeals was denied on January 29, 1973. It therefore appears that state remedies have been exhausted, at least with respect to the issue of coercion.

petitioner asserts that he was denied a speedy
trial and that his guilty plea was either coerced or based on
an equivocal admission of guilt.

petitioner had been incarcerated a little more than five months when he pleaded guilty to first degree burglary on June 23, 1971.

Although petitioner had a number of conferences

with his counsel, their last letter to him, a few weeks before the guilty plea, stated hat any were trying to obtain a trial date, and not that they were engaged in plea bargaining. Petitioner had written to his attorney in Jume 1971 concerning the length of his incarceration, but no mention of undue delay was made at the hearings on his change of plea.

attorney asked the court to let petitioner have a brief conference with his parent before proceeding, and the court stated, "We are talking in terms of fifteen years, so I would suggest that he speak to his parents before we continue." After a recess, petitioner's attorney stated that without any promises or representations by the District Attorney's office, petitioner would withdraw his previously entered plea of not guilty on the second indictment, and plead guilty to the crime of burglary in the first degree, a class B felony, to satisfy both indictments. In response to questions by the court, petitioner stated that he was 25 years old, had up to two years of college, understood the nature of the proceedings, and was offering to plead guilty to burglary in the first degree, a class B felony, to satisfy

all outstanding charges in the two indictments. In response to further questions, he stated that part of the consideration for the plea was the fact that the trial of the two separate rapes, the exposure with regard to punishment or sentence could be very severe, and that the sentence, if the guilty plea were accepted, would not exceed 15 years. Petitioner stated that no promises or threats had been made and that he was acting of his own free will, after talking to his mother and father and lawyers. When informed of his right to a trial by jury on each of the indictments, the petitioner said, "I must know the order of trial"; he was informed that the court would consider the wishes of the District Attorney, who had expressed a desire to try the second indictment first. In response to further questions by the court, the defendant admitted that he entered and remained unlawfully in a private dwelling house in the night time with intent to commit a crime. The questioning continued:

THE COURT: Was there an attempt to commit the rape?

THE DEFENDANT: It was an intent.

In response to further questioning, the defendant stated that he had no invitation, that he did not know the people in the house, and that he broke in through a window. The final

colloquy was:

THE COURT: So you were in that house for the purposes of committing a crime; is that correct?

THE DEFENDANT: Yes, sir.

After the acceptance of the plea, defendant made a statement asserting that he was not guilty of the charge in the first indictment. On further questioning by the court, petitioner stated that he understood that the plea he had offered was in satisfaction not only of the first indictment but of the second indictment, that there was an exposure involved in the second indictment, and in response to the court's question, "Is there any question in your mind that you are guilty of the burglary," petitioner answered, "Of the burglary, no."

At the hearing on the motion to withdraw the plea, petitioner was represented by another lawyer. Petitioner's mother testified that she had told petitioner to accept the plea that was offered because they had just paid the lawyers \$5,000 and couldn't do any more for him. She admitted that he had two lawyers, and that they had advised that under all the circumstances petitioner should take the plea.

Petitioner testified that he had told his mother

and the lawyers that he would not take the plea, but that his mother was crying and his father was ill and said that he could not afford any more lawyers, and that he answered questions under the advice of counsel without understanding their legal implications or knowing the elements involved in burglary. He said that he wanted to be tried on the earliest indictment first. In regard to the question whether he was pleading guilty because of the possible exposure in the event of a trial and conviction, he said:

Well, the exposure as I was told, would be trials in the order of the latest indictment first, which would not give me much of a defense and no defense at all. I had no choice.

With regard to the second indictment, he said again, "In that case, I had no defense."

He said that he had heard about the Legal Aid Society while he was in jail, but was told that such counsel were incompetent. He said that he had discussed the case with his attorneys on more than five occasions.

The court, in an opinion denying the motion to withdraw the plea, stated that the plea was justified under People v. Serrano, 15 N.Y.2d 304, 258 N.Y.S.2d 386 (1965), and North Carolina v. Alford, 400 U.S. 25, 91 Sup. Ct. 160

want to admit a forcible rape out of fear of the stigma that might attach, but that he admitted all the elements of the crime of burglary in the first degree, except that of physical injury. The judge ruled that there was no requirement that the indictments be tried in the order in which they were handed up, and that defendant offered no legal grounds for withdrawal of his guilty plea, citing people v. Dixon, 29 N.Y.2d 55, 323 N.Y.S.2d 825 (1971). The opinion concluded:

This court is convinced that the defendant, an intelligent and articulate individual, and who, while just twenty-five years old, is somewhat familiar with criminal court proceedings, understood the proceedings held herein. Moreover, the court notes that the defendant has never claimed innocence under indictment number 31363.

petitioner's letter to the court after his guilty plea stated that he could not account for what happened on January 16, 1971, the incident that led to the second indictment, except that he suffered extreme anguish because of the unfounded charge hanging over him for more than one year on the first indictment. However, the extent of corroborative evidence on the second offense was an important factor in determining the extent of exposure at a trial, and is not shown in the record.

The Conduct of Petitioner's Attorneys

A third possible claim emerges from the papers, although not clearly articulated. Petitioner's papers are well drawn, with copious citations, but are not the product of legal analysis.

The testimony of petitioner's mother on the plea withdrawal proceedings suggests that plaintiff's retained attorneys, although paid \$5,000 by his father, were unwilling to defend him if he refused to plead guilty. There may therefore be a basis to argue that his plea resulted from a combination of the abandonment of his defense by his retained lawyers, his lack of confidence in Legal Aid lawyers, and the lack of funds to retain other lawyers who would defend him.

Discussion

A plea of guilty normally waives all non-jurisdictional defects in connection with a prosecution. McMann v.

Richardson, 397 U.S. 759, 766, 90 S.Ct. 1441 (1970). There is no constitutional right to withdraw a guilty plea; withdrawal depends on the discretion of the judge, in determining whether the interests of justice will be furthered. The

focus of federal habeas corpus inquiry after the entry of a guilty plea is

the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity.

<u>Tollet</u> v. <u>Henderson</u>, 411 U.S. 258, 93 S.Ct. 1602, 1608 (1973).

states may, however, reserve to a defendant the right to post-trial review of non-jurisdictional claims after the entry of a guilty plea. This has been done in New York. CPL §§ 210.20, 710.20(3), 710.70(2). In such case reserved issues may be presented in a federal habeas corpus proceeding, but only if they were raised in the state proceedings. Bergin v. McDougall, 432 F.2d 935 (2d Cir. 1970).

In this case, the state court judge recognized that one of the essential elements of the crime to which petitioner pleaded guilty was missing. This may be a relevant factor, but it does not necessarily invalidate the guilty plea, for

An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling

or unable to admit his participation in the acts constituting the crime.

North Carolina v. Alford, 400 U.S. 25, 37, 91 S.Ct. 160, 167 (1970). The Court of Appeals in this circuit has recently emphasized the statement in Mr. Justice White's opinion in the Alford case that a plea refusing to admit commission of a criminal act may be permitted

when . . . a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.

400 U.S. at 37, 91 S.Ct. at 167; see <u>United States ex rel.</u>
Dunn v. Casscles, 494 F.2d 397 (2d Cir. March 25, 1974).

Speedy Trial

Normally, the entry of a guilty plea prevents a defendant from raising speedy trial claims. Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970). Here there is additional evidence of waiver in that the speedy trial issue was not presented to the Appellate Division in the brief submitted for petitioner.

In any event, the period of incarceration, between petitioner's arrest on the second offense in January 1971 and his guilty plea in June of the same year, is less than

the period that this court has found constitutionally permissible. See <u>Wallace</u> v. <u>Kern</u> (E.D.N.Y. 72-C-898, Memorandum and Order, March 7, 1974); see <u>People ex rel. Franklin</u> v. <u>Warden</u>, 31 N.Y.2d 498, 341 N.Y.S.2d 604 (1973).

with respect to the first indictment, the delay also did not reach constitutional dimensions under the tests specified in <u>Barker v. Wingo</u>, 407 U.S. 514, 519, 92 S.Ct. 2182, 2186 (1972). Again the rule applies that one who has pleaded guilty

may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann.

See <u>Tollet v. Henderson</u>, 411 U.S. at 267, 93 S.Ct. at 1608.

Although the scope of review in this respect may be broadened through state laws, New York did not give the right to raise the issue of a speedy trial after a guilty plea until September 1, 1971, after the plea in this case. CPL 210.20(a).

Finally, since petitioner's guilty plea to the second indictment resulted in effect in a dismissal of the first indictment, the time lapse before trial of the first indictment is not of constitutional significance.

Basis of the Guilty Plea

Because a plea of guilty may not be withdrawn at the whim of the accused, the Supreme Court has established certain requirements which must be satisfied before the plea is accepted. The plea must be knowing and voluntary, not induced by threats or unfulfilled promises by the prosecutor or the judge, and not shown to have been "unfairly obtained or given through ignorance, fear or inadvertence." Kercheval v. United States, 244 U.S. 220, 224, 47 S.Ct. 582, 583 (1927).

A strong suggestion to the defendant by his counsel or his relatives does not render a guilty plea involuntary; under such circumstances the plea may well represent a reasoned choice after exploring all possibilities in going to trial. United States ex rel. Brown v. LaVallee, 424 F.2d 457, 458 (2d cir. 1970), cert. denied, 401 U.S. 942, 91 S.Ct. 946 (1971).

The New York Court of Appeals has held that the requirements to sustain a guilty plea are not necessarily those set forth in the Standards of the American Bar Association or the Federal Rules of Criminal Procedure, but are dependent on the circumstances of each case. People v. Nixon,

21 N.Y.2d 338, 354, 287 N.Y.S.2d 659, 671 (1967).

In a collateral attack on a denial of a motion to withdraw a guilty plea, a federal judge may not evaluate the correctness of a state court's decision. United States ex rel. Best v. Fay, 239 F. Supp. 632, 634 (S.D.N.Y. 1965), aff'd, 365 F.2d 386 (2d Cir. 1966), cert. denied, 386 U.S. 998, 87 S.Ct. 1319 (1967). The federal court may, however, determine whether the defendant's plea was intelligent and voluntary in light of the totality of the circumstances.

The ABA Standards of Criminal Justice Relating to Pleas of Guilty specify that

First and foremost, inquiry ensures that the defendant actually committed a crime at least as serious as the one to which he is pleading.

Approved Draft, 1968, pp. 32-33.

It becomes necessary to examine the burglary statute to which petitioner pleaded, and the statutes which apply to the other offenses in the indictments.

At the time of the indictments and the plea, the New York statutes provided that a person could not be convicted of a sex offense, except sexual abuse in the third degree, on the uncorroborated testimony of the alleged victim. Penal Law § 130.15.

Burglary in the first degree, a Class B felony, requires proof that some participant in the crime was armed with a deadly weapon, or threatened its use, or

... causes physical injury to any person who is not a participant in the crime.

Penal Law § 140.30(2). Burglary in the first degree is a

Class B felony, which is punishable by an indeterminate

sentence of at least three years and not exceeding 25 years.

Burglary in the second degree may be established by proof of knowingly entering a building with intent to commit a crime, if "the building is a dwelling and the entry or remaining occurs at night." penal Law § 140.25(2).

Burglary in the second degree is a Class C felony, punishable by an indeterminate sentence of at least three years and not exceeding 15 years. Penal Law § 70.00(2)(c).

In his questioning by the state court judge,

petitioner admitted that he entered at night and that he had

the intent to commit a crime, but he refused to acknowledge

any actual rape or other crime, or causing "physical injury

to any person."

A recent statement concerning the responsibility of the court in taking a guilty plea is contained in <u>United</u>

States v. <u>Truglio</u>, 493 F.2d 574, 579 (4th Cir. 1974):

A guilty plea has been described as "perhaps the most devastating waiver possible under our Constitution," and the obligation of the trial court to monitor the constitutional rights of a defendant "is not to be discharged as a mere matter of rote, but with sound and advised discretion." Patton v. United States, 281 U.S. 276, 312, 50 S.Ct. 253, 263, 74 L.Ed. 854 (1930).

Since defense counsel did not refer to the <u>Serrano</u> or <u>Alford</u> cases in connection with the entry of the plea, and it does not appear that there was a factual basis for a plea to burglary in the first degree, the court did not have an adequate basis for accepting the guilty plea.

If given the right to change his plea, petitioner must either stand trial on the second indictment or plead guilty to burglary in the second degree. The latter alternative may not in itself be helpful, since even burglary in the second degree is punishable by a fifteen year sentence, but petitioner should be given an opportunity to make that decision.

Since the state court did not consider the extent of corroborating evidence, or the fact that the petitioner's admissions established only a Class C felony, the federal court should not decide those issues at this time. Bergin v. McDougall, 432 F.2d 935, supra.

The Conduct of Petitioner's Attorneys

must be considered in this case is the question whether petitioner's attorneys in fact refused to defend him at a trial of the second indictment. Neither of the original attorneys was a witness at the motion for withdrawal of the plea. They may have had more knowledge concerning the strength of the state's case on corroboration of the second offense than appears in the record. This area has not been explored.

Since this issue was not presented to the state court, it is not open for review in a federal court at this time under the requirement of specific exhaustion of state remedies.

Therefore, it is not necessary to review in detail the comparison between this case and <u>United States ex rel.</u>

<u>Dunn v. Casscles, supra.</u>

Matters Remaining Open

At any further hearing in the state court, it would be desirable to have petitioner represented by counsel who can cross-examine his original attorneys.

It is ORDERED that the petition be dismissed for failure to exhaust state remedies, without prejudice to renewal if further post-conviction proceedings in the courts of New York State are unsuccessful.

and dy

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FILED IN CLERK'S OFFICE U. S DISTRICT COURT ED. N.Y

23

OCT 1 7 1975

TIME A.M.....

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. EDWARD H. HARNED, JR.,

Petitioner,

73 C 1103

P.M....

- against -

R. J. HENDERSON, Superintendent, Auburn Correctional Facility,

October 16, 1975

Respondent.

Appearances:

HAROLD SCHWARTZ, Esq. Attorney for Petitioner M'FILMED

HON. LOUIS J. LEFKOWITZ Attorney General of the State of New York Attorney for Respondent

By: RALPH L. McMURRY, Esq.
Assistant Attorney General
of Counsel

JUDD, J.

MEMORANDUM AND ORDER

Petitioner, in state custody under a ten year sentence for burglary in the first degree, seeks a federal writ of habeas corpus. 28 U.S.C. § 2254.

Exhibit D

Facts

This is the third time the court has had occasion to consider the matter. By Memorandum and Order dated June 26, 1974, the petition was dismissed for failure to exhaust state remedies, without prejudice to renewal. In a Memorandum and Order dated June 23, 1975, after petitioner's state remedies had been unsuccessfully exhausted, the court designated an attorney, pursuant to 18 U.S.C. § 3006A(g), to present petitioner's arguments. A brief recitation of facts is necessary, without repeating all that was said in the prior Memoranda.

Petitioner was indicted in January 1970 for rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, and assault in the second degree. The alleged victim had filed her complaint in November of 1969, and was examined in a felony hearing on December 2, 1969. The petitioner was released on \$2,500 bail, and remained at large and untried at the time of his arrest in January 1971 on a second charge. On March 9, 1971, the petitioner was indicted for the second time, on charges of rape in the first degree, burglary in the first degree, and possession of burglar's tools. The petitioner was remanded to the Nassau County Jail.

On June 23, 1971 before Nassau County Court Judge Francis X. Altimari, the defendant entered a plea of guilty to the first degree burglary count in the second indictment, in satisfaction of the remaining counts in both indictments. On June 30, 1971, before sentence was imposed, the petitioner sought to withdraw his guilty plea on the ground that it was the product of his extended incarceration and the coercion of his weeping mother and terminally ill father.

was held in the state court on October 29, 1971. The motion was denied with an opinion dated December 23, 1971. Sentence was imposed on January 7, 1972. The judgment of conviction was affirmed by the Appellate Division. People v. Harned, 40 A.D.2d 952, 337 N.Y.S.2d 995 (2d Dept. 1972). Leave to appeal to the New York Court of Appeals was denied on January 29, 1973.

Petitioner thereupon filed his petition for habeas corpus in this court. That petition asserted the denial of his right to a speedy trial and that his guilty plea was either coerced or based on an equivocal admission of guilt.

In its Memorandum and Order dated June 26, 1974, this court

found petitioner's claims to be without merit, but dismissed
the petition without prejudice to renewal, so that two other
possible grounds for collateral attack on the guilty plea
might be presented to the state court. These two grounds were:

- (1) that the proceedings on the guilty plea showed only facts necessary for burglary in the second degree, and
- (2) that his attorneys refused to defend him at a trial even though they had received a substantial fee.

Petitioner presented these claims on his further application to the state court. The petitioner alleged that at the time of his decision to change his plea, his mother told him that the lawyers had been paid \$5,000 and that his parents could afford no further expense. Petitioner contends that his two attorneys refused to represent him at trial, thereby leaving him no alternative to pleading guilty. Petitioner was cognizant of the availability of Legal Aid Society assistance, but disdained such counsel as incompetent.

Petitioner asserts that his two attorneys promised to appear at the 1971 hearing to withdraw the guilty plea, but that they failed to do so. The minutes of the adjourned sentence hearing of August 20, 1971 show that petitioner

requested his attorneys' presence at the hearing and that the attorney who represented him there promised to attend and to ask his co-counsel to attend as well.

Petitioner's original attorney disagreed with his attempt to withdraw the plea. The court therefore stated that it would assign other counsel to argue the motion for withdrawal. That motion was heard on October 29, 1971, with petitioner represented by different counsel. His prior attorneys were not present, and there is no indication that there had been any effort to subpoens them to attend.

At that hearing, petitioner's new counsel called the petitioner's mother and petitioner himself to testify. When the Assistant District Attorney sought to question them on what the original attorneys had told them before the guilty plea, petitioner's new counsel objected to questions concerning privileged communication, even though the judge expressed a desire to hear about their fee.

Petitioner's second remaining claim is based on the absence in the proceedings for the entering of the guilty plea of any factual basis for an element necessary for burglary in the first degree - namely, the element of physical injury

to a person not participating in the rime.

As stated in this court's Memorandum and Order of June 26, 1974 (p. 15), petitioner admitted in his questioning at the time of the change of plea, that he entered the dwelling at night and that he had the intent to commit a crime, but he refused to acknowledge any actual rape or other crime, or that he had caused any "physical injury to any person," as required for burglary in the first degree under Penal Law § 140.30(2).

Petitioner, who had completed two years of college, acknowledged to the court that his exposure for sentence would be very severe on trials where he was charged with two separate rapes, one allegedly performed on November 15, 1969 and the other on January 16, 1971. The questioning continued (p. 5):

"THE COURT: And that is part of the consideration here?

THE DEFENDANT: Yes, it is.

THE COURT: I indicated to you if I accept this plea, the sentence of this court will not exceed incarceration in a state penitentiary for more than fifteen years, do you understand that?

THE DEFENDANT: Yes, I do."

With sepcific reference to the rape charge, the court asked (p. 8):

"THE COURT: Was there an attempt to commit the rape?

THE DEFENDANT: It was an intent."

At the hearing on withdrawal of the plea, when the petitioner was cross-examined concerning motivation, he stated (p. 21):

"A. Well, the exposure as I was told, would be the trials in the order of the latest indictment first, which would not give me much of a defense and no defense at all. I had no choice.

Q. So that you felt you would be convicted and that you would get a tremendous sentence, is that correct?

A. When one has no defense he is going to be convicted."

At pp. 23-24:

"Q. And what did you feel the result would be if you were convicted?

- A. An extended incarceration.
- Q. Extended beyond a period of fifteen years?
- A. Possibly.
- Q. And that is the reason that you took the plea?

A. It is one of the reasons, yes."

On November 14, 1974, the state court denied the habeas corpus petition without a hearing. The court concluded from the record that since petitioner had appealed from the denial of his application to withdraw the plea

"... either the ground now raised was previously determined upon the merits upon such appeal (CPL 440.10 (subd. 2(a))), or is currently appealable (CPL 440.10 (subd. 2(b))), or, although sufficient facts appeared upon the record to have permitted review upon an appeal, the defendant unjustifiably failed to raise the issue (CPL 440.10 (subd. 2(c))). In any event, this application must now be denied. (CPL 440.10 (subd. 2))."

Application for leave to appeal to the Appellate Division of the Supreme Court was denied on January 28, 1975.

The petitioner renewed his habeas corpus petition before this court on March 5, 1975. The petitioner also filed a motion for release on bail while his habeas corpus petition was pending. This court in its Memorandum and Order dated June 23, 1975 denied petitioner's motion for release on bail and designated Harold Schwartz, Esq., as attorney for petitioner. The parties have now filed memoranda of law with the court.

Discussion

The two claims raised by petitioner in this application for habeas relief: (1) the claim of abandonment by his counsel, and (2) the claim that the guilty plea proceedings failed to show facts necessary for all of the elements of burglary in the first degree, will be considered separately.

Petitioner has now satisfied the requirements of exhaustion of state remedies, since the state courts have had a "fair opportunity" to consider his constitutional claim.

<u>United States ex rel. Leeson v. Damon</u>, 496 F.2d 718 (2d Cir.), cert. denied, 419 U.S. 832, 95 S.Ct. 216 (1974).

Abandonment by Counsel

Respondent contends that petitioner had two opportunities to raise the claim of abandonment: at the hearing on the motion to withdraw the plea, and on appeal.

Petitioner here contends that he was induced to plead guilty by his counsels' refusal to represent him without a further fee, if he went to trial. However, petitioner's new counsel failed to produce any testimony relating to the alleged threats to withdraw from the case and further objected to the respondent's questioning concerning conversations with

prior counsel. Counsel may well have reasoned that his predecessors' testimony would prove unhelpful on the issue of abandonment and might boomerang on other issues.

Consistent with the teachings of Fay v. Noia,

372 U.S. 391, 438, 83 S.Ct. 822, 849 (1963), the record before this court demonstrates that petitioner and his counsel
at the hearing to withdraw the guilty plea "deliberately bypassed the orderly procedure of the state courts..."

In the absence of any valid claim that petitioner's original attorneys denied him his right to the aid of counsel, the plea appears to have been voluntary. The appropriate standard, as stated in <u>United States ex rel. Brown v. LaValle</u>, 424 F.2d 457, 461 (2d Cir. 1970), <u>cert. denied</u>, 401 U.S. 942, 91 S.Ct. 946 (1971), is whether the plea was

"the product of a rational assessment of the situation, based on the relevant consideration advanced by those who had petitioner's welfare at heart."

Petitioner's present counsel now attacks the attorney who represented him on the motion to withdraw the plea, saying that the attorney did not confer with him before the hearing and did not inform him ahead of time that he

would be a witness. This claim is not supported by the petition, and was first raised in the brief of the third attorney. The record of the hearing does not indicate that the second attorney was shockingly incompetent. No charges against the second attorney were presented to the state court on petitioner's latest application, so as to justify making this a ground for federal habeas corpus. Even if the matter were properly before this court, there is no adequate basis for a finding that petitioner was denied effective assistance of counsel on his motion to withdraw his guilty plea.

Factual Basis for the Guilty Plea

The transcript of the petitioner's entry of his plea of guilty to burglary in the first degree establishes clearly that the element of physical injury required for that degree of crime was not admitted.

In light of the close similarities between burglary in the first and second degrees, Penal Law §§ 140.30, 140.25, proof of the necessary elements was not established by petitioner's admission in open court, on several occasions, that he was guilty of "burglary."

Technically, the record is deficient in showing that defendant was in fact guilty of burglary in the first degree. New York law is clear that "the mere mouthing of the word 'guilty' may not be relied upon to establish all the elements of [the] crime." People v. Serrano, 15 N.Y.2d 304, 308, 258 N.Y.S.2d 386, 388 (1965). The Serrano case also established the right of a defendant to plead guilty in order to avoid exposure to the risks of trial, even if all the essential elements of the crime are not admitted. The court, however, set forth a procedure for accepting such a plea, stating (15 N.Y.2d at 309-10; 258 N.Y.S.2d at 389):

"It was, . . . his duty to refuse the plea and order the trial continued or, more appropriately, to advise the defendant that his admissions did not necessarily establish guilt of the crime to which he was pleading and to question him further both with regard to his story of the crime and as to the possible disposition of his request to change his plea. [Citation omitted]. Of course, once so advised that his version of the crime is not consistent with the charge to which he is pleading, a defendant might still wish to plead guilty, perhaps to avoid the risk of conviction upon a trial of the more serious crime charged in the indictment, and such a plea could be accepted by the court. The fact remains, however, that, before accepting a plea

"of guilt where the defendant's story does not square with the crime to which he is pleading, the court should take all precautions to assure that the defendant is aware of what he is doing. Manifestly, no such cautionary effort was here made."

The court in this case did not follow the requirements of the <u>Serrano</u> rule.

The question remains whether this error deprived the defendant of any substantial constitutional right.

The <u>Serrano</u> case involved a plea of guilty to murder in the second degree, which resulted in a sentence to a prison term of thirty years to life. Here the defendant was told that he faced a maximum sentence of fifteen years, and he was actually sentenced to ten years. Burglary in the first degree carries a maximum sentence of twenty-five years.

The Supreme Court dealt with the requirements of a guilty plea in McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171 (1969), where it interpreted F.R.Cr.P. Rule 11 to require that a federal district judge address the defendant personally and determine that the plea was voluntarily made with an understanding of the nature of the charge. The court stated:

"[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

Subsequent decisions have recognized the applicability of the McCarthy decision to state defendants. Boykin v. Alabama, 395 U.S. 238, 243 n. 5, 89 S.Ct. 1709, 1712 (1969); North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970). Alford denied that he committed murder, but said that he was pleading guilty to murder in the second degree because he faced the threat of a death penalty if he did not do so. The Court stated (400 U.S. at 37, 91 S.Ct. at 167):

"An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."

In the McCarthy case, the court stated that explanation of the elements of a lesser included offense "would seem a necessary prerequisite to a determination that he understands the meaning of the charge." 394 U.S. at 467,

n. 20, 91 S.Ct. at 1171. But the court also quoted the statement from Kennedy v. United States, 397 F.2d 16, 17 (6th Cir. 1968), that "[M]atters of reality, and not mere ritual, should be controlling."

State court guilty pleas have also been held to be subject to the requirement of the McCarthy rule that a plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." In Walker v. Caldwell, 476 F.2d 213, 218 (5th Cir. 1973), the court said that

"Providing this 'understanding of the law in relation to the facts' is the function of the accused's appointed counsel."

The importance of assuring that a defendant understands the nature of the charge to which he pleads guilty is emphasized in two authorities cited by the Supreme Court in the McCarthy case, supra, at 1171 n. 17. Newman, Conviction, The Determination of Guilt or Innocence Without Trial; ABA

Standards Relating to Pleas of Guilty, § 1.4(a). Failure to inform a defendant that second degree murder required proof of intent to cause the death of the victim resulted in vacating a plea of guilty in United States ex rel. Morgan v. Henderson,

(N.D.N.Y. 73 Civ. 440), aff'd, 516 F.2d 897 (2d Cir. 1975), petition for certiorari granted, Oct. 6, 1975, 44 LW 3178.

The circumstances in this case are unusual. Petitioner understood that he faced two serious charges of rape, together with lesser counts in the indictments. His admissions at the time he entered his plea showed all the elements necessary to establish guilt of burglary in the second degree. He did not claim to be innocent of burglary, and recognized that he would probably be convicted on one of the rape indictments. He had a promise from the prosecutor and the court that he would not be sentenced to more than fifteen years, which is the maximum sentence for burglary in the second degree. Second degree burglary is a lesser included charge in an indictment for first degree burglary. Penal Law § 140.30.

Thus while the ritual required by the <u>Serrano</u> and <u>McCarthy</u> decisions was not complied with, the reality of the situation shows that the plea was voluntary and that it was knowingly made, with knowledge of the major charge and of his exposure on the burglary charge.

The case has some analogy to <u>Cabrera</u> v. <u>United States</u>, 357 F.Supp. 1380 (S.D.N.Y. 1972), where a guilty plea was

Rule 11. Defendant had already been sentenced to a term of fifteen to sixteen years in state prison on a state narcotic charge. The United States Attorney had agreed that if he pleaded guilty to the federal offense, he would receive either a suspended sentence or a sentence concurrent with the state prison term. Judge Motley found that even if he was not informed of the elements of the charge to which he was pleading or the consequences of a conviction, it was unlikely that he would have made any different decision had he been fully informed. She further stated:

"It is difficult for a petitioner to show that his ignorance of the range of penalties provided for his offense contributed to his decision to plead guilty . . . [when] the record affords strong evidence of a plea bargain."

Id. at 1382.

See also <u>Grant</u> v. <u>United States</u>, 451 F.2d 931, 933 (2d Cir. 1971) (dictum).

Harmless Error

The failure to establish the element of physical injury is harmless error under the circumstances of this case. The Supreme Court in dealing with federal constitutional error has said that it cannot be disregarded unless it is harmless

beyond a reasonable doubt. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726 (1969); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967). Chief Judge Traynor has suggested that the question should be whether there is a "high probability" that the error did not affect the result. R. Traynor, The Riddle of Harmless Error, 35, 44-51, 80-81 (1970). The Second Circuit Court of Appeals has described the issue as being whether there is a "significant chance" that evidence would have induced a reasonable doubt in the minds of jurors.

United States v. Rosner, 516 F.2d 269, 273 (2d Cir. 1975);
United States v. Conanno, 430 F.2d 1060, 1063-64 (2d Cir.), cert. denied, 400 U.S. 964, 91 S.Ct. 366, (1970); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969). See also Rothschild v. State of New York, F.2d (2d Cir. Sept. 25, 1975) (Slip Opinion at 6197).

For non-constitutional errors, the New York Court of Appeals has used the phraseology of "a significant probability" as a standard for reversal. People v. McAuliffe, 36 N.Y.2d 820, 370 N.Y.S.2d 900, 901 (1975); People v. Crimmins, 36 N.Y.2d 230, 367 N.Y.S.2d 213 (1975).

Under any of these standards, it appears to the court to be immaterial whether petitioner was in fact informed of the difference between burglary in the first degree and burglary in the second degree.

Petitioner's counsel in this court, Harold Schwartz, has presented the issues fully and clearly and in a professional manner.

It is ORDERED that the petition be dismissed.

U. S. D. 1.

1	DISTRICT COURT OF THE COUNTY OF NASSAU	
2	FIRST DISTRICT : MINEOLA, PART VI	
3		
4	PEOPLE OF THE STATE OF NEW YORK,	
5	-ageinst-	Index # Fel 1902
6	EDWARD H. HARNED, JR.,	1903
7	Defendant.	FILED
		W. S. DISTRICT COURT ED, N.Y
9		*. JUL & 3 19/3
10	Before:	JOL 43 19/3
11	HON. LYMAN D. HALL District Court Judge	TIME A.M.
12		
13	December 2, Mineola, New	
14	APPEARANCES:	
15	WILLIAM CAHN, Esq.	
16	District Attorney, Nassau	County
17	Mineola, New York	
18	By: RONALD BEKOFF, Esq., Assis	tent District Attorney
19	RICHARD C. SCHULZ, Esq.	
	Attorney for Defendant	
20	362 Willis Avenue Mineola, New York	
21		
22	FELONY EXAMINATION	
23	Martin Kern	
24	Official Court Reporter	
25		(6)

3

10

11

the same time?

MR. SCHULZ: Yes, we would consent to that, your Honor.

Ohlhausen - direct

Edward H. Harned, Jr.

THE COURT: People against

MR. BEKOFF: People ready.

here against Edward H. Harned, Jr. Do

you consent that they both be tried at

MR. SCHULZ: Defendant ready.

THE COURT: We have two charges

12 13

MR. BEKOFF: Det. Ohlhausen.

14 DET. JOSEPH OHLHAUSEN, Shield #174, attached to the 6th Precinct, Nassau County,
15 Police Department, having first been duly sworn by the Judge of the Court, testified as follows:

17 DIRECT EXAMINATION BY

MR. BEKOFF:

19

Q Detective, on the 15th day of November, 1969,

21 were you a member of the Nassau County Police Department?

22 A Yes, sir.

23 Q On that occasion, did you have an opportunity

24 to investigate a rape?

A Yes.

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3

	Ohlhausen - direct 4
1	© During the course of that investigation,
2	did you speak to someone?
3	A Yes, sir.
4	Q Who was that?
5	
6	A Edward Harned.
7	Q Is that person present in the courtroom
8	today?
9	A Yes, sir.
10	Q Point him out to me, if you see him.
11	A The man in the green tie and shirt and brown
12	
13	jacket.
14	MR. SCHULZ: We concede 1t.
15	MR. BEKOFF: Thank you, Counselor.
16	Q Where did you speak to him?
17	A In his home; apartment.
18	Q In your own words, Detective, please tell
19	the court exactly what happened. First tell us the
20	
21	time?
22	A At approximately 5:05 P.M. I went to
23	THE COURT: What date?
24	THE WITNESS: November 15.
25	THE COURT: All right.

9.4

I went to 55 Tulip Avenue, Floral Park, building 5, apartment #4, a young man answered the door, 3 identified himself as Edward Harned, and I identified myself as Det. Ohlhausen. I asked him if he had an M G automobile, color blue. He said yes. He said. 6 7 is this in regard to speeding. I said, no, it isn't.' It's in regard to a rape. He then said, "Did that girl 9 claim I raped her? I said, Before you say anything 10 else, let me advise you of your rights." He started 11 to say something else and I told him to keep quiet until I finished advising him of his rights. I then 13 advised that - - . 14 15 Let's not go into that right now, if you 16 please, Detective. After you advised him of his rights, 17 what did he say? 18 He said that he refused to answer any questions. 19 I then said, well, I said, I only have one side of the 20 story. I was going to ask you to tell me what you 21 know about this, and he said - - well, he said she was 22 23 willing. I said this is a rape case and he then told. 24 me that this girl is a tramp, and that he went up to' 25 Port Washington, he called it the cliffs, and he told

No, sir.

Yes, sir.

Harned residence, were you alone at that time?

Q You had a partner with you?

Did you both go in the house together?

Chlhausen - direct

me that the kids go up there in this area and that

he was parked near someplace where there was some

put a blanket on the ground and that while he was

on the blanket with the girl, she kept saying. I

want to go home, I want to go home, and he said that

he got tired of hearing it and he got up, they both

building going on right now. He said he did:

100

1

3

5

6

7

21

22

23

24

25

A I couldn't say.

20

THE COURT: Yes, it calls for a

23 conclusion.

24 Q You characterized the defendant's state-

ment to you as being candid and horest?

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25

that night?

1	MR. BEKOFF: Objection, Judge.
2	THE COURT: Why are you objecting?
3	
4	MR. BEKOFF: It's all hear-say.
5	THE COURT: He can waive hear-say
6	of the People's witness.
7	MR. BEKOFF: I'm not waiving it.
8	THE COURT: No, but he can. You
9	don't have the right. He has a right to
10	waive hear-say. You don't have any say
11	
12	over hear-say on a People's witness.
13	You can object to hear-say when he calls
	his witness.
-14	
15	THE WITNESS: May I have the
16	question?
17	Q Did she tell you where she had been that
18	evening?
19	
20	A Yes, sir.
21	Q Tell us what she told you.
22	MR. BEKOFF: Agein, Judge, I am
23	going to have to object.
24	THE COURT: You have a blanket
25	objection to these forms of questions.

DC 146.

```
1
          Your objection is over-ruled.
         She told me they had been to the Camelot Inn.
 3
         Q Did she tell you enything further in
 4
    regard to the Camelot Inn? Did she tell you what
    happened at the Camelot Inn?
        She told me she met a boy at the Camelot Inn.
 8
              Did she tell you how she met him?
         Yes, sir.
10
         Q Will you tell us what she told you in that
. 11
12 | regard?
         She stated that the boy had asked her to dance.
13
         Q Did she state that she had known the boy
14
    before?
15
         No. '
16
17
         Q Did she tell you that she had never seen
18
    him before?
19
        Yes.
20
         Q Did she tell you that they had danced?
21
         Yes.
22
          Q Did she tell you how long she stayed with
23
```

24

25 A I don't recall the time exactly.

the boy at the Camelot Inn?

1	Q Did she tell you what time she left
2	the Camelot Inn?
3	A Approximately 12 o'clock, 12:30, I'm not sur
4	
5	of the time.
6	Q Did she leave alone?
7	A No, she didn't leave alone.
8	Q Did she leave with the defendant?
9	A Yes, she did.
10	Q Where did she go from the Camelot Inn?
11	MR. BEKOFF: Objection, Judge.
12	
13	THE COURT: Objection overruled.
14	A Went to her home.
15	Q When she arrived at her home, what did
16	she do then?
17	A She wanted to get out of the car. She was
18	unable to open the door. She said she asked the
19	defendant to open the door and he refused. When
20	
21	she finally got the door open, he then drove away
22	before she could get out, and he proceeded to go
23	in the direction of Sands Point.
24	Q Do you know where they went in Sands

DC 146.

25 Point?

1	A Yes, sir.
2	
3	Q Did the complainant give you that infor-
4	mation as to the location?
5	A Yes, sir.
6	Q Did you take a statement from the de-
7	fendant withdrawn. Did you take a statement from
8	the complainant? Did you take a statement from the
9	complaining witness?
10	
11	A I'm sorry. I thought you said you withdrew the
12	cuestion.
13	Q I asked you if you took a statement from
14	the defendant and I withdrew that. What I meant,
15	did you take a statement from the complainant?
16	A Yes, I did.
17	Q Will you produce the statement?
18	
19	MR. BEKOFF: No, sir, I will not.
20	THE COURT: I am directing you to
21	produce it.
22	MR. BEKOFF: The complainant is not
23	on the stand. This is the detective
24	testifying.

THE COURT: All right, she gave him

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25

MR. BEKOFF: I have no re-direct.

Ohlhausen - cross

that statement.

13

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1

25

1	THE COURT: Step down.
2	
3	MR. SCHULZ: May I have a five
4	minute recess, your Honor?
5	THE COURT: All right.
6	Call your next witness.
7	MR. BEKOFF: If it please the
8	Court, the People will call Mis Carol
9	McCormick.
10	
11	CAROL JUNE McCORNICK, residing at 93 Webster Avenue,
12	Port Washington, New York, having first been duly sworn by the Judge
13	of the Court, testified as follows:
14	보기 가장 하는 것이 없는데 그렇게 되었다면 나는 사람들은 사람들이 하는데
15	MR. BEKOFF:
16	Q I am going to ask you to speak up so we
17	can all hear you.
18	A Okay.
19	Q Carol, do you recall the evening of
20	November 15, 1969?
21	A It was on the 14th.
22	
23	Q Do you recall the 14th?
24	A Yec.
25	Q Where were you that evening?

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1	A I went to the Camelot with two girlfriends of
2	mine.
3	THE COURT: Was it the morning of
4	the 15th?
5	
6	THE WITNESS: No, it was at night-
7	time on the 14th, Friday night.
8	MR. BEXOFF: This incident happen-
9	ed on the morning of the 15th. Right
10	now we are talking about the night of
11	the 14th, before the incident at the
12	bar, the discotheque, if you will.
13	THE COURT: All right.
14	
15	Q What time did you get to the Camelot,
16	that evening, do you recall?
17	A About 10 o'clock.
18	Q You were there with two girlfriends?
19	A Yes.
20	Q Did there come a time when you prepared
21	to leave?
22	
23	A Yes.
24	Q Who did you leave with?
25	A I left with a boy that asked you know, he

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```
asked me if I'd like to leave with him.
2
        Q You met him that evening?
       Yes.
        Q Had you ever known him before?
5
        No.
7
         Q Did you ever have sexual relations with
   him before?
   Λ
         No.
10
         Q Okay. About what time did you leave?
11
        About a quarter after one.
12
         Q How did you leave?
13
        I don't understand.
15
        Q Did you leave by car, by bus or did you
16
   walk?
17
       By car.
18
         Q Whose car was it?
19
        Eddie's car.
     Q What kind of car was 1t?
21
22
       A dark blue M G.
```

Q What did you say happened after that, Carol?

He drove me home to my house and I tried to get

out of the car but I couldn't find the door.

24

25

- 1 Before you got home, did you ever find out his name? 3 Yes, I asked him his last name. When did this happen? On the way home. 7 Tell us about that? 8 Well, at the discotheque we introduced ourselves and he asked me my name and he told me his. 10 Then on the way home I asked him what his last name 11 was. I didn't understand him, so he spelled it. 12 That's the only thing I remember about it. 13 What happened when you got to your home? 14 I tried to get out of the car door and I couldn't 15 find the door, and you know, the door handle, so I 17 asked him if he could please open the door for me 18 and he didn't answer me. Then when I found the door. 19 it was locked and I still couldn't open it. I opened 20 it and then he just took off. 21 Bafore he took off, f'd you have any con-22 23 versation in the car?
- A Yes. He asked me if I would like to go for a drink. I said no, I want to go home.

	McCormick - direct 18
.1	Q Incidentally, Carol, did you have any-
2	thing to drink that evening at the Camelot Inn?
3	A No, I didn't.
4	Q What else happened in the car; anything
5	else?
6	A Yes, he tried to kiss me, and I kept on push-
8	ing him away from me. I kept on telling him I had
9	to go home because it was already late as it was.
10	Q What happened then?
- 11	A Then I got the car door open and he just took
12	
13	off and went through a red light on the corner near
14	my house, and passed my house and I kept on asking
15	him where was he going and he wouldn't answer me
16	and I told him I had to go home, he didn't say any-
17	thing. He said I'll bring you home in a few minutes.
18	Then he went through he turned left on the boule-
19	vard going down to Sanda Point.
20	
21	THE COURT: All right. Did you
22	eventually get to Sands Point?
23	THE WITNESS: Yes.
24	THE COURT: All right.
25	o What happened when you got to Sands Point

DC 146.

Carol? 2

1

He went down all the way to the end of the 3

road and then he backed up and turned into a dirt

lot and then he turned off the light and backed up

and I wanted him to bring me home. I didn't want

to go there. Then he said, well, if you want to 7

8 go home now, you have to walk home, so I got out

9 of the car to walk home and he started running after

10 me, and then he pulled my arm and he led me back to

11 the car by holding me behind my neck and he said I'll

12 bring you home now. Then I opened the door to get 13

in and he wouldn't let me in. He slammed the door 14

and he was shaking me, you know, holding my two arms 15

and I tried to get away from him but he was holding 16

17 me too tight. Then he slapped me, telling me to

18 shut up because I was screaming. .

19 Where did he slap you?

20 On the left side of my face. A

All right. 22

21

Then I kept on screaming, you know, for him to 23 A

let me go because he was hurting me, and then he 24

25 twisted my arm and pushed me over the back hood of

22

100

1

his car on my stomach and then he turned me over end he slapped me again hard. where did he slap you again this time? The left side of my face and on my ear. I started crying because my ear hurt. It kept on ringing and I couldn't hear anything. He was hurting me. Then he told me if I didn't shut up end cooperate that he'd hurt me even more. He pulled down my pants and he pushed me away from the car, and got a blanket out of the car and sat me down on the blanket, and I tried to get away from him but he kept on saying if I didn't cooperate that he'd bash in my teeth and asked me if I'd like to have 16 my teeth bashed in and I said no. Then he took off 17 my petti-pants and tights of my left leg and tried 18 to get his hand up my dress, and I was holding my 19 arm close to my chest end he kept on taking them 20 away from my chest. Then he said, now if I didn't 21

Then he stood me up again and he --23

24 Excuse me, when you said you did what he 25 said, what did you mean by that?

cooperate that he'd hurt me, so I did what he said.

again and he lied on top of me and stuck his penis

DC 14.6.

25

1	into my personal area, and I don't recall how long
2	that lasted, because I was looking over to my right
3	the whole time. I was crying. Then he knelt again
4	and he made me he stuck his penis into my mouth
5	
6	again by holding his hands behind my neck. Then he
7	pushed me down again and he stuck his penis into my
8	personal area for the third time and then he just
9	got up and gave me my clothes and told me to get in
10	the car and he'd take me home.
11	Q What happened then?
12	A He asked me whether I was going to tell my
13	parents and I just said nothing. Then he said are
14	
15	you going to tell the police well he made it in
16	a statement saying, you're not going to tell the
17	police, are you, and I said no. Then he stopped
18	in front of my house and I got out and he just took
19	off.
20	MR. BEKOFF: Thank you. I have
21	
22	no further questions of this witness.
23	CPOSS-EXAMINATION BY MR. SCHULZ:
24	Q Is it Miss McCormick or Mrs.?
25	

		1.6001 MICK - 61055
1 A	Miss.	
2	Q	You never have been married, have you?
3	No.	
4		THE COURT: How old are you?
5		THE WITNESS: Eighteen.
6		THE COURT: Do you go to school?
8		
		THE WITNESS: Yes, I go to the
9		Mendell Medical and Dental Assistant School.
10		THE COURT: All right.
11	Q	Do you have any children?
12		
13		MR. BEKOFF: Objection, your Honor.
14		THE COURT: Objection to what?
15		MR. BEMOFF: The question he asked.
16		Counselor asked if she ever had any child-
17		ren and I objected.
18	Q	Do you have any children?
19		MR. BEKOFF: Again I am going to
20		
21		renew my objection as to whether or not
22		she did have any children. It's completely
23		irrelevent. The only issue as to anything
24		pertaining to this witness's sexual be-
25		havior is whether she had sexual relations

DC 146.

	24
1	with this defendant before this date. Other
2	questions are completely irrelevent, your
3	Honor.
4	nonor.
5	THE COURT: I will permit the
6	question.
7	Q Did you ever have any children?
8	A Yes.
9	Q When did you have a child?
10	MR. BEKOFF: Objection.
11	Fire BEAUTY: Objection.
12	MR. SCHULZ: I think I have a
13	right to ask that question.
14	THE COURT: I will limit it to
15	one question. Was it prior to this
16	episode?
17	
18	THE WITHESS: I don't understand
19	you.
20	THE COURT: Did you have a child
21	prior to this episode or as a result of
22	this episode?
23	THE WITNESS: No.
24	THE COURT: Prior to this episode?
25	THE WITNESS: You mean was it his?
	. The withest; for mean was 1 his?

C 146.

0

1	THE COURT: Yes.
2	THE WITNESS: No.
3	THE COURT: Prior to this act, you
4	
5	had a child, prior to this occasion, this
6	date?
7	MR. SCHULZ: I don't believe she
8	understands the word prior.
9	THE COURT: Did you have a child .
10	before November 15, 1969?
11	THE WITNESS: Yes.
12	
13	THE COURT: All right. I'll limit
14	it to that.
15	MR. SCHULZ: Your Honor, you won't
16	let me pursue this line of questioning?
17	THE COURT: I think that's suffi-
18	cient.
19	MR. SCHULZ: All right.
20	
21	THE COURT: For these purposes, at
22	least.
23	Q Miss McCormick, describe the clothing you
24	were wearing on November 14th?
25	A I was wearing a brown checkered dress with brown

```
buttons down the front, a brown belt and brown tights
    and brown shoes and a blue navy ski jacket.
 3
      O This dress, how was it fastened, only by
 4
    buttons?
 5
        It had a zipper on the side too.
       Q Any other type of fastening?
 7
        No.
       Q was this what would be called a mini-
 9
10
    skirt?
11
    A No. it wasn't that short, just a dress.
12
        Q How many inches above the knee was the
13
    bottom of the hem?
14
       MR. BEKOFF: Objection.
.15
                   THE COURT: Objection overruled.
16
    How many inches from your knee was the
17
18
    bottom of your hem?
19
    A I'd say about five.
20
        Q Were you wearing any outer garments over
21
    your dress?
22
    A Just my jacket.
23
     How was your jacket fastened?
```

A By the zipper and the buttons.

24

25

```
1
        Q How many buttons?
 2
    A I don't know. It was snaps going all the way
 3
    up.
     Q What undergarments were you wearing?
 5
 6
    A bra, underpants, tights, petti-pants.
 7
         Q You have testified that the defendant
 8
    removed all that clothing; is that right?
 9
        Yes.
10
        Q Was any of your clothing torn in the
11
    process?
12
    A No.
13
    Q Any buttons removed while you were -
14
15
    while he was removing your clothing?
16
       No.
17
        Q Did you lose any buttons?
18
    A No.
19
       Q Break any zippers?
20
        No.
    A
21
22
        Q What did he do with the clothing after
23
    he took it off?
24
    A I don't know. I wasn't watching.
```

Q What were you doing while he was doing

25

```
DC 199 - 1/69
```

```
this to you?
2
       I was crying. I was holding my hands to my face.
3
        Q How did he get your jacket off if you were
   holding your hands to your face?
 5
   A He told me to put my hands down or else he'd
   bash my teeth in.
       Q You did put your arms down?
 8
        Yes.
10
        Q Then how did he remove your jacket? Did
11
   he open the buttons first?
12
   A I think it was already unbattoned. I didn't
13
    close it.
14
         Q How about your dress? Was that unbuttoned
15
    at this time? . .
                       16
17
       No. it wasn't.
18
        Q That was all buttoned up and zippered up?
19
         Yes.
20
```

21 Q So he removed your jacket. Did you put

22 your hands right back to your face so you couldn't

23 see him?

25

24 A No, he pulled everything down at the same time.

Q What did he do with it? Did he put it

1	in his car?
2	MP. BEKOFF: Objection, Judge,
. 3	asked and answered.
4	MR. SCHULZ: Credibility, your
5	Honor; observation, memory.
6	
7	THE COURT: She said she didn't
8	remember, as I recall the answer.
9	Is that your answer, you don't
10	remember?
11	THE WITNESS: He just left them
12	there.
13	Q Left them where? Tell us where he left
14	
15	them?
16	MR. BEKOFF: Again, Judge, it's
17	getting to the point where this witness
17 18	
	getting to the point where this witness
18	getting to the point where this witness is being badgered. She testified she didn't remember.
18 19	getting to the point where this witness is being badgered. She testified she didn't remember. THE COURT: Do you remember or
18 19 20	getting to the point where this witness is being badgered. She testified she didn't remember. THE COURT: Do you remember or don't you remember where he put your
18 19 20 21	getting to the point where this witness is being badgered. She testified she didn't remember. THE COURT: Do you remember or don't you remember where he put your clothing?
18 19 20 21 22	getting to the point where this witness is being badgered. She testified she didn't remember. THE COURT: Do you remember or don't you remember where he put your

DC 14g.

```
1
       Q That was your jacket. What did he re-
2
    move next?
3
       No, he took it all off at the same time.
 4
         Q Did he have to open the buttons on
5
    your dress before he removed your dress?
    A Yes.
7
         Q Did you have your jacket on while he
9
    was undoing those buttons of your dress?
10
    A
         Yes.
11
         Q How about the zipper, did he open the
12
    zipper?
13
       No.
14
         Q Or did you open the zipper?
15
          I did.
    A
16
         2 You opened it?
17
18
         Yes.
19
          Q You helped him undress you?
20
    A
         No.
21
                     MR. BEKOFF: Objection.
22
                     THE COURT: Objection overruled.
23
24
          Q You opened the zipper yourself?
25
          Yes.
```

20 146.

McCormick - cross

Q Did you help him remove your dress?

Q He did that himself?

31

20

18

19

1

2

3

4

No.

MR. HEKOFF: That is the basis

As I understand it, it went up over her

of my objection.

head.

23 MR. SCHULZ: I will withdraw the

last question.

25 Q Was your dress removed up over your head

```
or did you step out of it?
2
    A I stepped out of it.
3
         Q It dropped from your shoulders down and
4
    you stepped out ot it?
        And he sat me down.
         Q Was he holding you so you wouldn't lose
7
8
    your balance?
9
      Yes. My arms.
10
         Q Did you have to help him open up enything
11
    other than the zipper on your dress?
12
         No.
13
         2 At this point what were you wearing
14
    after you removed the dress and the outer garment?
15
    A. I don't understand.
16
17
          Q You told me you removed your jacket and
18
    he removed your dress. Did you have the rest of
19
    your clothing on at that time?
20
    A He pulled everything down at the same time.
21
         Q when you say everything, tell me what
22
    he pulled down?
23
24
                     MR. BEKOFF: Objection.
25
                      MR. SCHULZ: I don't know what
```

1	everything is, Judge.
2	THE COURT: As I remember, it was
3	a dress, a bra, panties, two pair of panties,
4	something else.
5	. What was the other article?
6	
7	THE WITNESS: My shoes.
8	THE COURT: No, you said there was
9	your underpants and something else.
10	THE MITNESS: Tights.
11	THE COURT: Tights and then another
12	
13	pair of panties?
14	THE WITNESS: Yes.
15	Re took all of this off in one fell swcop?
16	MR. BEKOFF: Objection, Judge as to
17	the characterization of the actions by
18	counsel.
19	THE COURT: Well, to shorten the trial
20	
21	I will let him ask it. Did he do it all
22	at the same time, take it all off at the
23	seme time?
24	THE VITNESS: No.
25	Q That is what I am trying to get at, Miss

```
1
    McCormick. You said he removed your jacket and your
 2
    dress. I am now asking at this point after those
 3
    garments were removed, what did you have on?
 4
    A I still had my tights and my petti-pants and
 5
    my underpants on my right leg.
7
         Q Did you have your bra on?
8
         Yes.
9
         Q Did you have your shoes on?
10
         Just one.
11
         Q One shoe?
12
         Yes.
13
        Q What happened to the other shoe?
14
    A He took it off.
15
16
       .Q . Did he do this before or after he removed
17
    your dress?
18
    A Before.
19
         Q What did he do, bend down on the ground
20
    to remove your shoe?
21
    A Yes, when he first sat me down. When I was
22
    leaning over the back of the car.
23
24
    Q You weren't sitting down, you were lean-
25
```

ing over the back of the car when he removed the shoe?

	Medorates, = cross
1	A No, I was leaning over the back of the car,
2	and he pulled my pants down. Then he made me sit
3	down and then he took off everything at one leg.
4	Q Which leg was that, the left?
5	A Yes.
7	Q Then you were talking of your tights.
8	You were saying your petti-ants and something else
9	
10	you mentioned, I don't recall what else it was.
11	That was all taken off your left leg?
12	A Yes.
13	You had to raise your leg to get out of
14	those garments, didn't you?
15	A (No response).
16	Q Let me make it clear, Miss McCormick.
17	When you removed your tights, you can't remove them
18	while your leg is staight, can you?
19	MR. BEKOFF: Objection.
20	MR. SCHULZ: I think the witness
21	
22	is being a little cute, Judge.
23	MR. BEKOFF: Judge, we are deal-
24	ing here with a case where a woman is

being raped.

DC 199 -

25

MR. SCHULZ: Wait a minute.

McCornick - cross

MR. BYKOFF: Excuse me, counselor.

MR. SCHULZ: Don't try the case now.

We have got a mere accusation. A very important hearing for a very serious crime.

MR. BEKOFF: Granted. As to the whole purpose of this hearing, here we are dealing with a woman who is crying by her own testimony and has her hands over her face and is hysterical and we cannot hold her to any minute point. We have gone over this more than once. I think this line of questioning has already served its usefulness.

MR. SCHULZ: If your Honor please, we have got - -

THE COURT: Go on. Let's finish this thing.

Miss McCormick, let's get to the tights. You have got one leg off, one leg of the tights removed. Did you raise your knee to remove those tights

1

2

3

4

5

6

7

8

9

17

18

19

20

21

22

23

24

25

```
from your leg?
 2
     Λ
         He did it for me.
          Q Did he touch you with his hand?
          Yes.
     A
          Q What part of your body did he touch?
 6
     A My legs, my arms, everything.
         Q Just a moment. Was he holding on to your
 8
     arms while he removed the tights?
10
     A No.
11
         Q What was he holding?
12
   I.A
        My leg.
13
         A He was holding your leg with one hand and
14
     removing your tights with the other?
15
         Yes.
16
        Q Were you standing up straight?
17
18
     A
         No.
19
        Q Were you leaning over the car?
20
         No.
21
         Q Were you down on the floor?
22
        Yes.
    A
23
24
        Q Down on the ground?
```

C 146.

25

A

Yes.

```
o On the blanket?
          Yes.
          Q When you were leaning over the car.
 4
    what did he remove, if anything?
                      MR. BEKOFF: Objection, Judge.
 6
                      THE COURT: Counselor, we are
 7
 8
                going over and over this. Next
 9
                question.
10
               Miss McCormick, you indicated to Mr.
11
    Harned several times during the evening that you had
12
    to be home early; is that right?
13
          Yes.
14
          Q What was early, what time would that be?
15
          One o'clock.
16
    A
17
          Q what time did you eventually get home?
18
          Very close to 2:30.
    Λ
19
          Q Were your parents up when you arrived
20
    at home?
21
    A My mother was.
22
              What did your mother say to you?
23
          Q
24
                      MR. BUKOFF: Objection.
25
                      THE COURT: I don't see that it's
```

1	relevent, really.
2	MR. SCHULZ: Well, your Honor,
3	this is subject to connection.
4	
5	THE COURT: All right.
6	MR. SCHULZ: There is testimony of
7	a bruise on the face. It's possible
8	that the defendant did not put the
9	bruise on her but the parents did.
10	THE COURT: Did what?
11	MR. SCHULZ: Give the defendant
12	
13	the bruise.
14	THE COURT: I didn't hear any
15	testimony of any bruise.
16	MR. SCHULZ: All right.
17	Q Then you arrived at home, Miss McCormick,
18	did your parents strike you?
19	
20	MR. BEKOFF: Objection.
21	THE COURT: Well, I would let her
22	answer.
23	Did they strike you in any manner?
24	THE WITHESS: No. Did he?
25	THE COURT: Did they?

C 146.

```
1
                  THE WITNESS: No.
        Q You testified earlier that you were
   outside of the car at Sanda Point and the defendant
4
   was holding you end then he went to get a blanket?
5
   A Yes.
       Q Where did he get the blanket, from the
7
8
   car?
    A Yes.
10
        2 Did he have to let go of you while he
11
   got the blanket?
12
   A Yes.
13
    Q What did you do while he was getting
14
   the blanket?
15
       I screamed and I gried.
16
      Q Did you run?
17
18
    A
        No.
19
        & How far from the nearest house were you
20
   at that location, do you know?
21
                   MR. BUKOFF: Objection.
22
                   THE COURT: This is important.
23
24
              'hy are you objecting?
25
               MR. BUKCFF: Because I don't feel
```

1	it's relevent.
2	THE COURT: Isn't it relevent
3	if a person is being raped and has
4	an opportunity to escape; isn't that
5	relevent in your opinion?
6	MR. BEKOFF: No, sir.
7	
8	THE COURT: It has no bearing
9	on it?
10	MR. BY/OFF: No, sir.
11	THE COURT: Overruled. Please
12	
13	be seated.
14	Q Where were the nearest houses, Miss.
15	McCormick, when you screamed, if you know?
16	A I didn't see any houses. I didn't see enybody.
17	G You drove down to the end of the road,
18	with the defendant before he stopped?
19	Λ Yes.
20	
21	Q Did you pass any houses as you drove
22	along the road?
23	A Yes.
24	Q How many?
25	A I don't know.

00 100 - 1/60

```
There came a time when the defendant
   you said backed into a dirt area?
       Yes.
 4
        Q Did you see any houses around that dirt
5
   area?
   A No. only a tractor.
7
8
         Q I beg your pardon?
         A tractor.
10
        c there there any cars down the road while
11
   you were in that dirt area with the defendant?
12
        No.
        2 You didn't see any headlights at all,
14
   did you?
15
16
   A Coming back up on the road?
17
        Q Yes, that's what I moon, cars going back
18
    on the road?
19
    A He went all the way down to the road, the end
20
    of the road and there was a big circle and he went
21
    around it and that's - - I don't know how many houses
22
23
    there were, just a couple.
24
     C Three or four, would you say, at that
```

C 140. C 199 - 1/69

25

circle?

```
1
    A Yes. Then he came practically all the way
 2
    back up and even if I screamed, they couldn't have
 3
    heard me.
         Q Past three or four houses at the circle
 5
    end of Forest Road; is that right?
    A I don't know the name of it.
 7
 8
          C These were completed houses, people
 9
    lived in there?
10
                     IR. BEKOFF: Objection.
11
                      MR. SCHULZ: Observation.
12
                      THE COURT: Well, if she knows.
13
                      THE WITNESS: I don't know.
14
       Q When Mr. Harned pulled into this dirt
15
16
    spot, wasn't there a house 50 feet behind you?
17 .
   A I didn't see sny.
18
          Q With lights on?
19
    A
         No.
20
         Q You didn't see headlights coming down
21
    while you were there?
22
23
                     MR. DEKOFF: Objection. Asked
24
                and answered.
25
                      THE COURT: Objection overruled.
```

DC 146.

```
1
                   THE WITNESS: No.
2
         Q How long did you remain at Sands Point
   with Mr. Harned?
       I'd say about an hour, almost.
5
   Q When you arrived there, did you do a
   little necking in the car before you got out of the
7
8
   cer?
9
   A No.
10
         Q Did you do a little necking, leaning up
11
    against the car before he ever removed any of your
12
    clothing?
13
                 MR. BEKOFF: Objection.
14
                    THE COURT: Objection overruled.
15
16
                    THE WITNESS: No.
17
         Q No necking?
18
         No. I said he tried to kiss me at my house,
19
         Q That was in front of your house, wasn't
20
    it?
21
         Yes.
22
    A
          Q The lights were lit in your house, weren't
23
24
    they?
25
                     MR. BUKOFF: Objection.
```

1	MR. SCHULZ: There was an
2	opportunity to escape, she was
3	sitting in front of her house.
4	MR. BEKOFF: We have heard
5	testimony
6	ed a vanority — —
7	THE COURT: Were the lights
8	lit in front of your house?
9	THE WITNESS: I was trying to
10	get out of the door and he wouldn't
11	let me out of the door.
12	
13	THE COURT: All right.
14	Q Was your window open on the passenger's
15	side at this time?
16	A No.
17	
17	Q But you got the door open and before you
18	were able to get out, he sped off; is that right?
19	You had the door open at this time, did you scream?
20	Tour inguity and of open are only and you continue
21	MR. BEKOFF: Objection.
22	THE COURT: Objection overruled.
23	MR. SCHULZ: It's awfully diffi-
24	cult with these objections, your Honor.
25	I can't gather my thoughts.

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4	
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U	U

1	THE COURT: These questions
2	haven't been asked.
3	MR. SCHULZ: I have never
4	asked her before this, the questions
5	that I am asking her now.
6	
7	THE COURT: Go ahead.
8	Q When you first came to your house, the
9	first time, with Edward Harned when he drove you to
10	your home, the lights were lit in your house; weren't
11	they?
12	A Yes.
13	
14	Q You got the door open; did you not?
15	A Yes.
16	Q Did you scream at that time?
17	A Yes, I asked him where he was going.
18	Q I didn't ask you if you had a conversa-
19	tion with him. I asked you whether you screemed at
20	that time?
21	
22	A Yes.
23	Q You did scream?
24	A I didn't screem. I screemed, where are you
25	going I soresmed at him to ston; whose one you

1	going.	
2		THE COURT: Were you stopped when
3		
4		you got the door open?
5		THE WITNESS: I don't know.
6		MR. BEKOFF: Again, I am going
7	1	to have to object.
8		THE COURT: You may object. It's
9	r	my question. The objection is overruled.
10	3	Please be seated.
11		
12		then you got the door open, was
13		the car standing still?
14		THE WITNESS: Yes. Then he took
15		right off.
16		THE COURT: Right.
17	Q .	Let's get back to Sands Point again, Miss
18	McCormick.	You stated before I believe these are your
19		
20		f they aren't, you will correct me, I am
21	sure, Edward	said to you, if you do not cooperate, I
22	will hurt you	a. Are they the exact words or are they
23	your words?	
24	A Yes, th	at's what he soid. He soid if I didn't.
25	cooperate, I	111 hurt you even more than you have been.

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1
                At this point, had he removed your
2
    garments yet?
 3
         He said it several times.
 4
                He used those precise words?
 5
          Yes, that's what I remember. I don't know if
    he put in any words like and, if, or but, but that's
7
8
    what I remember hearing him saying.
9
         Q What did you understand those words to
10
    mean?
11
                      MR. BEKOFF: Objection.
12
                      THE COURT: Objection sustained.
13
                Next question.
14
                Miss McCormick, you also said earlier that
15
    Edward placed his penis into your mouth, is that what
16
17
    you seld?
18
          Yes.
19
          Q Was your mouth open at the time?
20
          No.
21
          Q Was it closed?
22
    A
          Yes.
23
24
                Could you tell me how he did that?
25
    A .
          I was screaming.
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)C 146.

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1
          Q In the middle of a scream is when he
 2
    was able to accomplish this?
 3
    A No. Then I started to cry and he held his arms
    behind my head and he pushed me closer. He just stuck
    it in.
     Q You had to open your mouth to make it
    possible; did you not?
 9
                    MR. BEKOFF: Objection.
10
                    THE COURT: Well, I will let her
11
                answer it.
12
         Yes.
13 1
               You did open your mouth to make this possi-
14
15
   ble?
16
                     MR. BEKOFF: Objection.
17
                     MR. SCHULZ: She said yes. I just
18
               want her to repeat 1t.
19
                     MR. BEKOFF: That is the besis of
20
               my objection.
21
                      THE COURT: What is the basis of
22
23
               your objection?
24
                     MR. BEKOFF: She just answered the
25
               question that counsel asked again.
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MR. SCHULZ: I'm sorry. I will
2
              withdraw it. I was thinking out loud.
3
               I think you indicated earlier that he
    did this twice, did he not?
         Yes.
         Q One time he held his hands behind your
7
    neck and pulled you down toward him, is that what
8
9
    you said?
10
    A I don't remember.
11
          Q You said that he introduced his penis
12
    into your mouth twice; is that right?
13
      Yes.
14
         Q The first time you we. kneeling?
15
         I was kneeling?
16
    A
17
         Q That's what I am asking you; were you?
18
          No.
    A
19
          Q What position were you in the first time
20
    he did that?
21
    A I was sitting down.
22
       Q What position was he in?
23
24
       He was kneeling.
25
         Q Did he have his hand on any parts of your
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1
    body at that time?
    A I was lying down and he took my shoulders and
 3
    made me sit up and then held his hands behind my neck
    and pulled me close to him and he kept on nudging mo
 5
    to come closer.
         Q You were sitting and he was kneeling?
 7
 8
         Yes.
    A
 9
         Q He had both hands on you?
10
         Yes.
11
          Q He had no hands on his penis at all,
12
    did he?
13
    A Not to get me to come close to him, no.
14
        Q As a matter of fact, he didn't touch his
.15
16
    penis at all, did he?
17
          Yes.
18
          Q When he introduced it into your mouth,
19
    is that when he touched it?
20
    A Yes.
21
         Q So he had to let go of you in order to do
22
    that?
24
    A He still had one hand behind me, though.
25
         Q I think earlier you said he had his hand
```

behind your neck. You didn't use the plural when

	5	THE COURT. She said hands in
	6	the beginning and then he had one hand,
	7	apparently. Next question.
	8	MR. SCHULZ: I just want to be
	9	clear, Judge.
	10	Q When you arrived at your house the first
	11	
	12	time, and then sped off before you could get out of
. 1/69	13	the car, he drove along Washington Boulevard, did he
DC 199 - 1/69	14	not?
	15	A No, coming up Main Street.
	16	Q So you went from your house to Sands Point.
	17	You would have to travel along Main Street in Port
	18	Washington to get to Sands Point; is that right?
	19	
	20	MR. BEKOFF: Your Honor, I am
	21	going to object to these questions.
	22	MR. SCHULZ: I think it is a
	23	simple question to ask her what street

they were on.

THE WITNESS: We were -

2

3

24

25

you testified earlier?

A Yes.

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1
                     MR. BEMOFF: Carol, please.
2
                    THE COURT: Objection overruled.
3
               You live in Port Washington, don't you?
4
         Yes.
         Q You live about a hundred feet off Main
6
    Street in Port Washington, don't you?
7
8
        Yes.
9
         Q You know where Main Street is in Port
10
    Washington, do you not?
11
         Yes.
    A
12
   Q Edward Harned brought you home the first
13
    time, and you weren't able to get out of the car and
14
    he went to this place in Sands Point. He drove along
15
16
    Main Street, did he not?
17
    A He drove up Main Street, yes.
18
         Q Along Main Street, it was all lit up,
19
    wasn't it?
20
         Yes.
    A
21
        Q As a matter of fact you passed a police
22
23
    booth, didn't you?
24
    A I wasn't looking.
25
       . Q Weren't you nervous --
```

1	MR. BEKOFF: Objection, Judge.				
2	THE COURT: Objection sustained.				
3	Q This M G automobile, you remember the				
4					
5	color, you remember the make of the car, you also				
6	recall that it had a gear shift and brake lever be-				
7	tween you and the driver?				
8	A I never said that but I know sports cars do				
9	have that.				
10	Q I never said you said it. I'm just				
11	wondering whether you observed it in this particu-				
12	lar instance?				
13					
14	A I saw him shift but I didn't see any brake things.				
15	Q This place he shifted from was between your				
16	seat and his seat; wasn't it?				
17	A Yes.				
18	Q It has bucket seats, this car?				
19					
20	A Yes.				
21	Q Is 1t possible for a driver to get from				
22	the driver's seat to the passenger's seat?				
23	MR. BEKOFF: Objection.				
24	THE COURT: I don't know what bearing				
25	that has on it.				

	MR. SCHULZ: What I am trying
2	to drive at is this girl has told us
3	it was impossible for her to get out
4	
5	of the car and it had all this machin-
6	ery between her and the driver, and she
7	did nothing in an effort to escape.
8	THE WITNESS: I did.
9	THE COURT: That isn't the question.
10	The question you asked is whether the
11	
12	driver could get into her seat. To me
13	that makes no sense, that kind of a
14	question.
15	MR. SCHULZ: What I am leading to
16	is whether this driver could have stopped
17	her from escaping. Even if he tried, he
18	couldn't even get to be star of the even
19	couldn't even get to her side of the car
	without getting out and running around;
20	isn't that a fact?
21	
22	MR. BEKOFF: Objection.
23	THE COURT: I will sustain the objec-
24	tion.
25 Q	when you got to the front of your house the

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first time and you ovened the door, did you have any
    of your feet out of the car at that time?
 3
    A I couldn't even get them up. The car was too low.
 4
         Q When you got to Sends Point and he went
 5
    down to the end of the road and came back, and you
    said he backed into the dirt spot, he had to stop his
    car to back up, didn't he?
 8
 9
    A
        Yes.
10
         Q Did you make an effort to get out of the
11
    car at that time?
12
        When he stopped the car, I did.
13
         Q When he stopped to back it up, you didn't
14
    though; did you?
15
16
         No.
17
         Q Men he stopped the car, you got out? .
18
         Yes.
    Å
19
          Q What did you do; run?
20
          Yes.
    A
21
     . Q How far did you run?
22
    A
         I ran out into the road.
23
24
          Q Did you get to the road?
25
   . A
        .. Almost.
```

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1
               Miss McCormick, when you left Sands Point
    and he started driving back home to your house for the
 3
    second time, you went along Main Street to your home?
 4
                     MR. BEKOFF: Objection, Judge, any-
 5
               thing that happened after the incident is
               irrelevent today.
 7
 8
                     THE COURT: No, I will take it.
 9
               Did you go along Main Street back to your
        0
10
   home after you left Sands Point on Main Street in Port
11
    Weshington?
12
         Yes.
13
        Q Did Edward Harned pull up in front of your
14
   house and let you out?
15
16
       On the side of my house.
17
        . Q You told him you wanted to go in the back
18
    door, didn't you?
19
       I just said, stop her.
20
         Q Did you tell him you wanted to go in the
21
    back door?
22
        No, I just said, stop here.
23
24
        hen you got back in the car for the last
25
    time, at Sands Point, were you fully dressed?
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MR. BEKOFF: Objection, Judge.

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1		THE COURT: No, I will permit
2		it.
3		
4		THE WITNESS: Was I running
5		Q Yes.
6	A	No.
7		Q One more question, Miss McCormick? This
8	place	, the Camelot Inn in Mineola, that is a place
9		you pick up boys; isn't it?
10		MR. BEKOFF: Objection, Judge.
11		
12		THE COURT: No, I will permit it.
13	A	No, for me it isn't, no.
14		Q You didn't go there for that reason?
15	A	No.
16		MR. BEKOFF: Objection.
17		THE COURT: Objection overruled.
18		
19		Q Did you go there for that reason on
20	November 14, to go there to pick up a boy?	
21	A	No.
22		MR. SCHULZ: No further questions.
23		MR. BEKOFF: I have a couple of
24		questions on re-direct, if I might, your
25		Honor?

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1
                     THE COURT: Yes.
   RE-DIRECT EXAMINATION BY
  MR. BEKOFF:
         Q You have testified so far, Carol, as to
   what happened. You have referred to Edward Harned as
   the person who did that. Would you recognize him?
         Would I?
 8
               Yes.
          Q
         Yes.
10
         Q
               Is he here today?
11
         Yes.
12
13
               where is he?
          Q
14
         Sitting right there.
15
                     MR. BEKOFF: Your Honor, may the
16
                record please reflect identification?
17
                      THE COURT: All right.
18
                      MR. BEKOFF: All right, thank you.
19
                Did you at any time, Carol, give permission
          Q
20
21
    to Mr. Harned to have sexual relations with you?
22
          No.
23
                      MR. BEKOFF: Thank you. No further
24
                questions.
```

THE COURT: All right.

25

25

THE COURT: Weives making a state-

McComick

	McCormick 64
1	ment?
2	WR. 1.2: 68.
3	THE COURT: Does the defendant
4	
5	have any witnesses?
6	MR. SCHULZ: No witnesses.
7	THE COURT: It appearing there is
8	sufficient cause to believe that a crime
9	has been committed in each case, sufficient
10	cause to believe the within named Edward
11	
12	Harned, Jr. guilty thereof, I order that
13	he be held to enswer the same was he
14	out on bail?
15	MR. SCHULZ: Yes, on bail, your
16	Honor.
17	THE COURT: I see that no bail was
18	fixed here.
19	
20	MR. SCHULZ: It was fixed in County
21	Court. That may be the reason.
22	THE COURT: How much was it?
23	MR. SCHULZ: \$2500.
24	THE COURT: Order he be held to
25	answer the same and he be admitted to bail

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		MCCOHAICK
1	1	n the sum as fixed by the County
2	C C	ourt.
3		How old was he at the time?
4		
5		MR. SCHULZ;
6		THE COURT: Was bail fixed in
7	b	oth cases?
8		MR. SCHULZ: It covered both cases,
9	У	our Honor.
10		THE COURT: Did he put up bail on
11	0	ne case or both cases?
12		
13		MR. SCHULZ: He was arraigned on
14	ъ	oth charges at the same time, and Judge
15	K	elly indicated the application would in-
16		lude both charges and he treated it as
17		ne.
18		THE COURT: He is held on both cases
19		nd admitted to bail in the sum fixed in
20		
21	τ	he County Court.
22		* * * * * * * * * * * *
23	I hereb	y certify the above is a true and accurate
24	transcript.	Minth



JUL 23 1973

COUNTY COURT : NASSAU COUNTY

PART V

P.G.....

73°C 1103

THE PEOPLE OF THE STATE OF NEW YORK

-against-

: Ind. #31363 #28586

EDWARD H. HARNED, JR.,

Defendant. :

Mincola, New York June 23, 1971

Before:

HON. FRANK X. ALTIMARI,

County Court Judge

Appearances:

ROBERT STRAUS, ESQ.
Assistant District Attorney

for the People

JOSEPH McCARTNEY, ESQ. and RICHARD SCHULTZ, ESQ.

for the defendant

MINUTES OF CHANGE OF PLEA

MICHAEL WOWK Official Court Reporter

Exhibit F

Exhibit

THE CLERK: Are you Edward H. Harned, Jr.?

THE DEFENDANT: Yes.

THE CLERK: You appear with your attorney,
Mr. Joseph McCartney?

THE DEFENDANT: Yes.

THE CLERK: And Richard Schultz?

THE DEFENDANT: Yes.

THE CLERK: Your Honor, on one indictment the man is listed as Edward H. Harned, and on the other it is Junior, and he states his name is Junior.

MR. STRAUS: I move to amend the other indictment.

THE COURT: The application is granted.

THE CLERK: Is there an application in this case?

MR. McCARTNEY: Before you make the application, if it pleases the Court, Mr. Harned has asked me to ask the Court if you would consent to him having a brief conversation with his parents before we proceed.

THE COURT: By all means. Are the parents here?
MR. McCARTNEY: Yes, they are.

THE COURT: We are talking in terms of fifteen

years, so I would suggest that he speak to his parents before we continue. Where are his parents?

MR. McCARTNEY: In the back.

THE COURT: All right, he may talk to his parents and we will recess for the moment.

(This proceeding was thereupon recessed and upon reconvening, the following occurred:)

THE CLERK: Is there an application in this case?

MR. STRAUS: Your Honor, this matter has been conferenced with Mr. McCartney and Mr. Schultz. There were two indictments before the Court, No. 28586 and 31363.

Pursuant to those conferences and without any promises or representations being made to this defendant by the District Attorney's office to induce any plea of guilty, the People would permit this defendant, Edward H. Harned, Jr., to withdraw any previously entered plea of not guilty and on Indictment 31363 enter a plea of guilty to the crime of burglary in the first degree, a Class B felony, that plea to satisfy Indictment 31363 and also to satisfy Indictment 28586.

We ask that any motions pending be withdrawn pending the Court's acceptance of the plea.

MR. McCARTNEY: There are no such motions pending.
We concur in that application. Your Honor.

THE COURT: What is your name, young man?

THE DEFENDANT: My name is Edward H. Harned, Jr.

THE COURT: What is your age?

THE DEFENDANT: Age is 25 years.

THE COURT: How much schooling have you had?

THE DEPENDANT: Up to two years college..

THE COURT: Do you understand the nature of these proceedings?

THE DEFENDANT: Yes, I do.

THE COURT: You understand you are offering to plead guilty to burglary in the first degree, which is a Class B felony?

THE DEFENDANT: Yes.

THE COURT: And that plea will satisfy the charges also of rape in the first degree in one indictment and rape in the first degree in another indictment, do you understand that?

THE DEFENDANT: May I make a statement? Yes, I do understand that.

taking the position that you are offering this plea on the burglary first only and you are prepared to admit the burglary in the first degree only and indicate to this Court that because of the possible exposure with regard to a trial and a possible conviction, that you are offering the plea also in that regard?

THE DEFENDANT: On the burglary, yes.

THE COURT: And you also know that on a trial of the action, if you so desire it, where you have two separate rapes, one allegedly performed on the 15th of November, 1969 and the other on the 16th of January, 1971, that the exposure with regard to punishment or sentence could be very severe, you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: And that is part of the consideration here?

THE DEFENDANT: Yes, it is.

THE COURT: I indicated to you if I accept this plea, the sentence of this Court will not exceed incarceration in a state penitentiary for more than fifteen years, do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Now, other than what I have just said to you, have any promises or threats been made to you with regard to the offering of this plea?

THE DEFENDANT: No, they have not.

THE COURT: You do it of your own free will?

THE DEFENDANT: Yes, I do.

THE COURT: I assume that you have just talked to your mother and father; is that correct?

THE DEFENDANT: It is correct.

THE COURT: And you have talked to your lawyers about this thing?

THE DEFENDANT: Yes, I have.

5:

THE COURT: You understand you are entitled to a trial and a trial by jury on each of the issues created by each of the separate indictments?

THE DEFENDANT: In what order, sir?

THE COURT: I don't know in what order, but you are entitled toa trial on each of them. Do you understand that?

Do you understand you are entitled to a trial?

THE DEFENDANT: I must know the order of trial.

THE COURT: No, the order of trial I understand *

is at the prerogative of the District Attorney, but I

could change that if there be some good cause shown.

But the order should be the oldest of the two indictments.

MR. McCARTNEY: May I make a statement, Judge?
THE COURT: Yes, surely.

MR. McCARTNEY: We have had extensive and detailed conferences with the District Attorney on the question of the priority of the trials, Mr. Schultz and myself, and it was our understand, Judge, that the latter indictment, the more recent one, it would be the District Attorney's desire to try that one first.

Attorney would be listened to by this Court, but except for good cause shown, I might decide that the other indictment be tried first, but that is not really the problem here. The problem here is, is he in fact guilty of burglary in the first degree and I will get to that question.

Do you understand you are entitled to a trial on each of the indictments?

THE DEFENDANT: Yes, I do.

THE COURT: And do you understand on this trial

you may examine and cross-examine witnesses who testify against you?

THE DEFENDANT: Yes.

THE COURT: Do you say you don't want a trial and a trial by jury, but would rather plead to burglary in the first degree in satisfaction of both indictments?

THE DEFENDANT: Yes, sir.

THE COURT: On the 16th day of January, 1971, in the night time, did you enter and remain unlawfully in the dwelling house of a person by the name of Bahrer, located at 374 Stewart Avenue, Garden City, New York, Nassau County, with intent to commit a crime therein?

THE DEFENDANT: Yes, sir.

THE COURT: It is alleged here that the crime that you intended to commit was rape. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Was there an attempt to commit the rape?

THE DEFENDANT: It was an intent.

THE COURT: That's all I want to know, was there

an intent to commit the crime of rape and was it at night time? Let's start from the beginning. Did you enter the house by reason of license or invitation?

THE DEFENDANT: The answer to the last question is yes.

THE COURT: All right. So you went to the house unlawfully; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: You had no invitation?

THE DEFENDANT: Yes, sir.

THE COURT: It was night time?

THE DEFENDANT: Yes, sir.

THE COURT: Did you know these people at all?

THE DEFENDANT: No, sir.

THE COURT: So you went into a strange house at night. Did you break through?

THE DEFENDANT: Yes, sir.

THE COURT: How did you break in?

THE DEFENDANT: Through a window.

THE COURT: So you were in that house for the purpose of committing a crime; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right, the plea is accepted.

And this was on the 16th day of January, 1971?

THE DEFENDANT: Yes, sir.

THE COURT: The plea is accepted.

THE CLERK: Edward H. Harned, Tr., the Court has directed me to inform you if you have any prior felony convictions that may be proven, you may be subject to additional punishment.

Do you now wish to withdraw your plea of not guilty under Indictment 31363 and at this time interpose a plea of guilty to burglary in the first degree, a Class B felony, in satisfaction of this indictment and Indictment 28586?

THE DEFENDANT: Yes, sir.

(The defendant was sworn and his pedigree taken.)

THE CLERK: Date for sentence, Your Honor?

THE COURT: Before we do that, let it be understood clearly by all concerned that after I have an investigation and a probation report, which I will have between now and the day of sentence, that if I cannot in good conscience give you fifteen years, that is if I must give you more than fifteen years, I will allow you to withdraw your plea and you can have your trial. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The plea is acceptable and sentence date is August 23rd.

THE DEFENDANT: I would like to make a statement.

MR. McCARTNEY: Your Honor, may he make a brief statement to you?

THE DEFENDANT: Concerning this plea.

THE COURT: Yes, surely; go ahead.

THE DEFENDANT: Sir, concerning Indictment 28586, dated January 20, 1970, I am not guilty of this charge.

I have never been guilty of this charge.

THE COURT: That is the charge of rape in the first degree, a charge of sodomy in the first degree, a charge of sexual abuse in the first degree, a charge of assault in the second degree.

THE DEFENDANT: Yes, it is.

THE COURT: Let me just read them out for the record. You say you are not guilty of those?

THE DEFENDANT: I have never been guilty of them.

THE COURT: All right. Do you understand that
the plea that was offered by you was to burglary in
the first degree in satisfaction of that indictment
and the indictment charging you with rape in the first

degree, sodomy in the first degree, sexual abuse in the first degree and assault in the second degree; you understand that?

THE DEFENDANT: Yes, I do.

either or both of these indictments, that you may very well either be acquitted or convicted. I don't know whether you will or you won't, but if you were convicted, you know that the punishment involved could be a great deal more than the fifteen years that I have offered you with regard to the burglary in the first degree.

Is there any question in your mind that you are guilty of the burglary?

THE DEFENDANT: Of the burglary, no.

THE COURT: All right. I understand your position.

Your position is clearly that you are guilty of

burglary in the first degree, but you don't feel guilty

with regard to the other.

THE DEFENDANT: I know I am not guilty.

THE COURT: All right, your position is you are not guilty with regard to the rape in the first degree. However, you do know that there is an exposure in the

event there is a trial and there is a conviction.
You know that?

THE DEFENDANT: I know that this case, the second pending case would be brought up at that trial, and my testimony would be prejudiced.

THE COURT: Do you know that there is a risk involved, risk in quotes, risk meaning that the jury of your peers can either find you innocent or guilty of that rape?

THE DEFENDANT: Yes, I realize that.

THE COURT: And if they find you guilty of that rape, you know the charge is a serious one and the punishment could be far greater than the fifteen years I have indicated to you, and is that part of the consideration for the offering of the plea? I am not asking you to admit to the rape in the first degree. What I am saying to you is, as long as this Court is satisfied that you know that you are in fact guilty of burglary in the first degree and I am satisfied because the rape charge is being included to the extent that it is now in satisfaction of, do you understand that?

* THE DEFENDANT: This one charge I am ploading

to covers all charges?

THE COURT: Right. It is not an admission of the rape.

THE DEFENDANT: What do I say to people when they ask me why I didn't take it to trial if I know I am innocent?

THE COURT: Then take it to trial.

THE DEFENDANT: I would be so prejudiced.

THE COURT: I am not here to convince you that you should or should not take this plea. I think your position is clear. You say you never did what is charged in that indictment.

THE DEFENDANT: I never did it, no.

THE COURT: You are not admitting to that indictment. I did not ask you to admit because I took the

position that you took in the beginning. You say you
are innocent. My question to you is, are you guilty

of the burglary?

THE DEFENDANT: Yes, I am guilty of the burglary.

THE COURT: And at the time you committed the burglary, you entered this house at night time for the purpose of committing a rape; isn't that true?

The fact that you didn't consummate the rape is of no

consequence. I want to know whether or not you committed a burglary.

THE DEFENDANT: Yes.

THE COURT: All right, I think the record is clear.

MR. McCARTNEY: Thank you, Your Honor.

MR. SCHULTZ: Thank you, sir.

CERTIFICATION:

I hereby certify this is an accurate transcript.

M. Work



Letter, Dated June 30, 1971, from Edward H. Harned, Jr., To Frank M. Altimari, Judge

Edward H. Harned, Jr. P.O. Box 172
East Meadow, N.Y. 11554
June 30, 1971

Hon. F.X. Altimari Nassau County Courthouse Mineola, New York 11501

Dear Sir:

Mednesday morning, June 23, 1971 I pleaded guilty to Burglary I, a class B felony, in satisfaction of indictments 28586 and 31363. There were several factors that influenced me in making this decision. Both attorneys, Richard C. Schulz and Joseph P. McCartney told me prior to June 23, 1971 that if I did not accept the Court's offer immediately, trials would begin shortly in decending sequence by indictment dates; and at the first trial the charges of the pending indictment would be brought to the attention of the jury.

My parents, having been influenced by these counselors, and from whom comes the funds to retain lawyers, threatened to withdraw their financial support upon my refusal of the court's offer.

Fear of an even longer incarceration, prejudiced trials in an unjust order, and lack of family support forced me to plead guilty to the above mentioned charge.

One reason I so much wanted a trial on the earliest indictment is my innocence of each and every charge.

Since my arrest on November 16, 1969 I have asked for a trial, only to be told that waiting is best. I waited and now the chance for me to prove anything may have past.

I have remained in Nassau County Jail since January 17, 1971. I have not asked for bail on indictment # 31363. It took me four months to begin to understand what happened in the early

morning hours of January 16, 1971. It will take more months before a complete answer to the question, what happened, is found.

The charges pending against me before January 16, 1971 play a tremendous part. That young woman lied. Why she lied I may never know. A trial may or may not bring this out. For the rest of my natural life I shall have to explain to friends, relatives, and employers where I have been and why. More important, to myself I must ask why did I not demand a trial and clear-up some of the accusations against me.

This sir, is the purpose of this epistle.

I do not seek a trial on the latter charges, only the earliest. I wont to prove that I did not do that which is charged.

I wish to withdraw the plea of guilty I gave Mednesday morning until after this trial.

I am asking this only if the jury is kept ignorant of the other indictment and if I am once again given the opportunity of a conference.

These two stipulations are important and necessary.

On account of the nature of the charges, once the prosecution has brought up a pending indictment, even though objected to by the defense, the jury might no longer be impartial.

Indictment 31363 contains three charges. I do not contest the severity of these charges, nor the sentence. The crime was unpremeditated. I cannot prove it was accidental. I do wish to bring the circumstances surrounding this indictment into the light. Fifteen years is a hugh piece of my life to loose without some small explaination being offered by me.

I have not mentioned the possibility of conviction. One must trust something. I have been willing to trust twelve men and women, hearing both sides of the story for the past nineteen months. I am prepared to accept their verdict and any consequences that may follow.

Each of us is an individual. He are separate and distinct from each other in many respects. Individuals within a society

feel and act similarly in respect to certain actions of that societies members. There are criminal charges that the American people accept. There are Criminal charges that bring terror to the minds of these same people.

Anyone of the felonies named in indictment # 28586 will envisage similar images of horror and outrage from these people.

Emotions are deeply stirred. Great sympathy is displayed for the accuser. Everything from disbelief to hate is felt for the accused.

I have been accused of such crimes and have been the recipient of these horrendous feelings. The emotions roused within me have been close to unbearable. Those to whom I was close were shocked when they learned of my arrest. This indictment has exerted more influence on my life than anyother single incedent.

I have been advised to forget it.

I can forget the money paid to a lawyer; the money paid to a bondsman; the money paid to private investigators; the money lost while I remained imprisioned awaiting bail; the money lost while meeting with my counsel; and the money lost at Court sessions.

I can forget that only by lying was I able to keep my job after my arrest. I can forget the continuing lies to my employer about why I would be absent on certain days.

How does one forget the looks on the faces of the people when they learned for what he was accused.

How does one forget the months of uncertainty. The anxiety of never knowing what may happen. The anticipation of a speedy and just trial.

How does one forget that which has disrupted his life and mind for so long when he is to remain in an environment that will remind him.

Fffteen years is too long a period in my life to give up without clearing myself of the atrocities of indictment 28586.

There is the story of the cuckoo and the three men.

The first man waits for the cuckoo to sing. He spends his entire life waiting and doing nothing.

The second man encourages the cuckoo to sing. He uses his talent of persuasion and spends his life tring.

The third man kills the cuckoo because it won't sing.

My life has been a pattern of the second man. What concatenation of events caused me to deviate from this standard on January 16, 1971 and resemble that of the third man remains to be learned. Without this answer rehabilitation becomes only a word and not an actuality.

I feel the case pending against me prior to January 15, 1971 is an important part of this answer. There is an immeasurable difference between maybe he's innocent and he is innocent.

I am appealing for Your Honor's consideration on this matter.

An affirmative reply will free me from the accusations of indictment 28586 as well as aid me in finding the answer to my problem.

Since I remain in jail, please send me word that this letter has been received.

Respectfully,

(Signed) Edward H. Harned, Jr. COUNTY COURT : NASSAU COUNTY PART VI

THE PEOPLE OF THE STATE OF NEW YORK :

-against- : Ind. #31363

EDWARD H. HARNED, JR.,

Defendant.

·U. S. DISTRICT COUNTED. N.Y

Mineola, New York THME AM.
October 29, 1971 & P.M.

Before:

HON. FRANK X. ALTIMARI, County Court Judge.

Appearances:

STEPHEN SCARING, ESQ., Assistant District Attorney, for the People.

JOSEPH C. BOTTITTA, ESQ.,

for the Defendant.

MINUTES OF HEARING TO WITHDRAW GUILTY PLEA

THE CLERK: People versus Edward H. Harned, Jr. Both sides ready?

MR. SCARING: People have an application, your Honor. I just received this case. Could we have the Hearing at two o'clock so I can familiarize myself with the case.

THE COURT: Well, you know, I don't know why it's come as a surprise to you. It was some time ago that I put it down for a hearing. And I think I made it clear at the outset, if I go along with the withdrawal of the plea, there is going to be an immediate trie.

MR. SCARING: I just received it from Mr. Beldi.
That's why it comes as a surprise to me.

THE COURT: Notice to Mr. Belfi is notice to you.

MR. SCARING: Practically speaking, it is not.

THE COURT: Come up, gentlemen.

(Discussion at the Bench, off the record.)

THE COURT: All right.

THE CLERK: Both sides ready?

MR. SCARING: Your Honor is denying that

application?

THE COURT: Yes.

MR. SCARING: The People are ready.

THE COURT: All right, gentlemen.

MR. BOTTITTA: At this time, your Honor, may I make an application:

Your Monor has directed the defendant to proceed with the hearing on his application to withdraw his guilty plea. I submit to your Honor very respectfully, and I have submitted law on that point, that a hearing here would be unnecessary and would be prejudicial to the rights and the interests of this defendant because he will be exposed and required to make certain statements that might be used against him in the future.

THE COURT: You have my assurance that nothing uttered will at any time be used at any subsequent proceeding. The only purpose of this proceeding is to determine whether or not he understood the nature of the proceedings of June 23, 1971 where he did in fact, offer a plea and which plea was in fact accepted.

I can't give you any greater assurance than the fact that nothing said at this hearing will at

any time be used by anyone against this defendant.

MR. BOTTITTA: May I have an exception to your Honor's ruling on that point?

THE COURT: Yes.

MR. BOTTITTA: Thank you very much.
I call Mrs. Harned.

LEONA HARNED, 55 Tulip Avenue, Floral Park,
New York, called as a witness on behalf of the
Defendant, and being first duly sworn, testified
as follows:

DIRECT EXAMINATION

BY MR. BOTTITTA:

Q Mrs. Harned, are you the mother of the defendant, Edward Harned?

A Yes, I am.

Q On June 23, 1971, were you present in Judge Altimari's Part when your son's matter came up for a conference of some sort?

A Yes.

Q And were you accompanied there at that time by Mr. Harned?

A Right.

- Q Your husband, is that right?
- A Yes, sir.
- Q Now, Mrs. Harned, on that day in that courtroom, did you have a conversation or discussion with your son, the defendant?
 - A I did.
- Q And did Mr. Harned, your husband, participate in this conversation?
 - A Yes.
- and to the best of your memory, what was said by your son, what was said by you and what if anything was said by your husband during that conversation or discussion?
 - A Well, we told Edward that he should accept what was offered him because we had just given a lawyer five thousand dollars and with my husband's illness our bank account was depleted and we couldn't do any more for him.
 - Q Your husband has passed away, has he not?
 - A Yes, two weeks ago.

MR. BCITITTA: I have no other questions.

CROSS EXAMINATION

BY MR. SCARING:

- Q Mrs. Harned, you had an opportunity as afforded to you by the Judge, to talk to your son whether or not he should take this plea?
 - A Yes, sir.
- Q And how many attorneys was he represented by at that time?
 - A Two.
 - Q Were they both present?
 - A Right.
 - Q Did they also discuss this case with your son?
 - A I presume so.

MR. BOTTITTA: I am going to object to any questions pertaining to any conversation with the defendant's attorneys at that time.

THE COURT: I would suggest that the only
purpose for which it was offered was to establish
something about a large fee, and that was her reason
for suggesting to her son that he should, in fact,
take the plea. Now, I want to hear it all.

MR. BOTTITTA: If your Honor please, may I point out that this conversation may go beyond that. It may go into the area of a privileged communication.

THE COURT: Counsel, I assure you, there is no jury. This hearing will in fact remain before this Court only and will never again be heard from or used for any purpose other than to help me make a judgment as to whether or not I should allow him to withdraw his plea. Now, if you want me honestly and sincerely to really consider withdrawing this plea, I have to know everything that's available.

MR. BOTTITTA: Well, I would like to tell the Court right new that I am going to object to any conversations, any disclosure of any conversations.

THE COURT: All right. You have a continuing objection to the entire matter. And the objection is overruled.

MR. BOTTITTA: Thank you.

Q Mrs. Harned, then you discussed this incident with your son and also with your two atterneys while you were in Court, is that correct?

A Before we came in Court, the attorneys told us what it was going to be and then I talked to Edward in the Court.

And there came a time when the Judge afforded

you an opportunity to talk to him again after the proceedings had started, is that correct?

- A No. Just before he started the proceedings.
- Q But you did have an opportunity to talk to him at that time?
 - A Right.
- Q Now, you said you had given the attorneys five thousand dollars, is that correct?
 - A Right.
- Q And that was the fee to represent your son with respect to the charges against him, is that correct?
 - A Right.
- Q And your attorneys had advised that under all of the circumstances that your son should take the plea, is that correct?
 - A Yes.
- And was it in that context that you said to your son that you had paid these attorneys five thousand dollars and that's their recommendation and we suggest that you follow that recommendation?
 - A Yes, I said I couldn't do any more for my son.

 MR. SCARING: Thank you very much.

REDIRECT EXAMINATION

BY MR. BOTTITTA:

Q Did you tell your son that you couldn't afford to pay any more money for legal fees and other expenses in connection with his case, is that right?

A That's right.

MR. BOTTITTA: All right. Thank you.

MR. SCARING: No further questions.

(Witness is excused.)

MR.BOTTITTA: I call Edward Harned, the defendant.

EDWARD H. HARNED, JR., 55 Tulip

Avenue, Floral Park, New York, called as a witness
on behalf of himself, and being first duly sworm,
testified as follows:

DIRECT EXAMINATION

BY MR. BOTTITTA:

Q Mr. Harned, you are the defendant in this hearing, is that right, sir?

A I am.

Q Mr. Harned, were you in Court in Judge Altimari's Fart on June 23rd, 1971?

- A I was.
- Q At that time did you have occasion to talk to your father and mother about certain procedures and certain situations that you wanted to discuss with them?
 - A I did.
- Q And will you tell the Court please, to the best of your memory, what was said by you, your father and your mother at that time?

Well, I walked into the courtroom and there were other proceedings taking place. I looked at both parents and I nodded, no, I was not taking my plea. My father became outraged, my mother was crying. You know, there was some discussion, and I asked my attorney that I wanted to speak to my parents. The Judge granted this. I walked back there and I said, "I am not taking this plea. There is no way."

THE COURT: You told this to whom?

A . My parents. I told it to both attorneys resent. I said, "I am not taking it." My father was ill. And he was-my father had had a way of-he told me he had no more money and he could not afford any more attorneys. They were at the end. My mother was crying. They told me

I was better off if I had mirdered somebody. What do you want me to tell you?

- Q Mr. Harned, at that time also, did you testify or make statements before the Court in answer to some questions that were posed to you by the Judge?
 - A I answered questions under the advice of counsel.
 - Q But did you answer those questions?
 - A Yes, I did.
- Q Now, did you understand the legal implications involved in your answers?

MR. SCARING: I object to the question.

THE COURT: I will allow it.

A ' No, I did not.

THE COURT: You didn't understand that you were going to be incarcerated for almost fifteen years?

THE WITNESS: I understood that, yes.

THE COURT: All right.

- Q Now, Mr. Harned, you were offered a charge of burglary in the first degree in satisfaction of all the counts in the two indictments, were you not?
 - A Yes, sir.
 - Q And in the course of that conversation, in

answering the questions posed to you by the Court, you agreed to plead guilty and you did plead guilty to the charge of burglary in the first degree, did you not?

- A I did.
- Q . Did you understand the elements involved in burglary when you pleaded guilty on that occasion?
 - A No.
 - Q Nevertheless, you pleaded guilty, is that right?
 - A I was told to plead guilty.
- Q Mr. Harned, eventually, did you make an application to the Court for the withdrawal of the plea of guilty?
 - A Yes, I did.
 - Q When did you make the application?
 - A I started writing it that afternoon, June 23rd.
- Q Do you recall when you mailed or forwarded the application?
- A I had to wait for approval from the jail. It was about the 30th.
 - . THE COURT: The record will stand clear that this Court received notification rather rapidly after the plea.

- Q And now you are asking the Court for permission to withdraw the plea of guilty, is that right, sir?
 - A I am.
- Q And you do that with knowledge of the fact that you face any number of serious felony charges, is that right?
 - A I am aware of that.
- Nevertheless, you still maintain, you still ask the Court for permission to withdraw your guilty plea, is that right?
 - A . I do.

MR. BOTTITTA: I have no further questions.

CROSS EXAMINATION

BY MR. SCARING:

- Q Incidentally, Mr. Harned, what is the reason that you now wish to withdraw your plea?
- A It was so stated in a letter to the Court dated June 30th. Also in the application of my attorney, Mr. Bottitta.
- Q Well, would you tell me please, what your reasons are that you now wish to withdraw your plea?
 - A Burglary first degree is remaining unlawfully

- in a dwelling at night with the intention of committing a crime. Intent, I have no idea of what it was. To my best knowledge, I am not guilty of burglary in the first degree.
- Q . And is that the reason that you wish to withdraw your plea?
- A Not entirely, no. I do wish a trial on the earliest Indictment 28536.
- Q And is that the reason you wish to withdraw your plea?
 - A It is part of the consideration.
 - Q And what is the rest of your consideration?
- A I have given you two. I am not guilty of one indictment completely, absolutely.
 - THE COURT: Be careful now, young man. I think he gave sufficient reason. He said he wanted to be tried on the early indictment and he said that he is not-does not fall within the definition of burglary in the first degree. Therefore, he is not guilty.
- Q Are those your complete reasons for at this time wanting to withdraw your plea?
 - A .I feel it would be to my best interests to

withdraw this plea.

- And are there any other reasons, Mr. Harned, that you wish to withdraw your plea?
 - A At this moment, I couldn't think of any.
- Q Mr. Harned, you indicated that someone told you to plead guilty. Who told you to plead guilty?
 - A . My parents.
 - Q Anybody else?
 - A The attorneys that were present.
- Q The attorneys didn't say, "plead guilty", did they?
 - A Yes.
- Q Didn't they say that they recommended that you plead guilty?
 - A Yes.
 - O Recommend?
 - A Recommend, yes.
 - Q Did you accept their recommendation?
 - A Under the circumstances, I had no choice.
 - Q Did you accept their recommendation?
 - A I did.
 - Q You did?

- A I went along with what they wished.
- Q You said that you would plead guilty, didn't you?
- At first, no, I told them I would not plead guilty and then I went along with it, yes.
- Q After you had a conversation with both of your attorneys?
 - A With my parents, not with the attorneys.
- Q Didn't you also have a conversation with your sttorneys before you pled guilty?

A No.

MR. BOTTITTA: At this time, your Honor, for the record, I object to any conversations between the attorneys and the defendant.

MR. SCARING: It is relevant to the issues here as to whether or not--

THE COURT: Develop his state of mind without going into what an attorney told him or didn't tell him. If he chooses to make remarks to develop that thought, that's his position. But I wouldn't ask him what a lawyer told him, if anything.

MR. SCARING: May I ask him if he had the

opportunity to consult with his attorneys before-THE COURT: Absolutely.

THE COURT: I think the record is clear, and my clear recollection is that he appeared before me, I indicated to him that the plea would carry with it no more than fifteen years in a State Penitentiary, I said to him, I think, "look, it is a serious matter. Don't do it until you have talked to someone." I stepped off the Bench and I gave him, I don't know how much time, ten or fifteen minutes, to speak to his mother and father. He then came back and said he wanted to plead. So I know and I take notice of that.

THE WITNESS: You consider ten minutes an opportunity as to fifteen years?

that he had opportunity to think about it and talk

THE COURT: Don't talk to me, young man. Just listen carefully.

Q How many years of schooling have you had,
Mr. Harned?

about it.

A High school and college, two years.

- Q Did you graduate from college?
- A No.
- Q Are you or were you employed before you were incarcerated?
 - A Yes.
 - Q What capacity?
 - A Computer programming.
 - Q Do you have any education along those lines?
 - A Yez.
 - Q How many years?
 - A Five months of school, a few days, I.B.M.
- Q Do you recall appearing before Judge Altimari when you took this plea?
 - A I do.
- Q Do you recall him saying to you, 'do you understand the nature of these proceedings"?
 - A The nature of the proceedings --
 - Q Do you recall him saying that?
 - A Yes, sir.
 - Q Do you recall your answer being, "yes, I do."
 - A Yes, I do.
 - Q Do you recall the Court saying, "you understand

you are offering to plead guilty to burglary in the first degree which is a Class B felony?"

MR. BOTTITTA: What Page?

MR. SCARING: Page 4.

MR. BOTTITTA: Thank you.

THE COURT: Pardon me. Maybe you ought to step back so you can keep your voice up and he can respond in kind.

MR. SCARING: Yes, sir.

- Q Do you recall the Court saying to you, "Mr. Harned, you understand you are offering to plead guilty to burglary in the first degree, which is a Class B felony," and do you recall your answer being, "yes, I do."
 - A I do.
 - Q . Did you understand it?
- A · Ididn'f know what a Class B felony was at the time.
- Q Mr. Harned, you didn't ask that question, did you, when the Court asked you that question?
 - A No. sir.
 - Q You said you understood?
 - A Yes, I did.

- Q Were you afraid of Judge Altimari?
- A I was nervous.
- Q Were you confused by his question?
- A Some of them, yes.
- Q Were you confused by that question?

A I heard the question burglary first degree, all after that makes no sense, Class B doesn't do anything for me.

THE COURT: You don't know what a Class B felony is?

THE WITNESS: I do at this time.

THE COURT: What is it?

THE WITNESS: Felonies range in classes, A, B, C. A carried life, B carries twenty-five years

THE COURT: All right.

and so on.

THE WITNESS: I don't know what they mean though.

THE COURT: All right.

Q Do you recall this question being asked of you by the Court and this answer:

"It is my understanding that you are taking

the position that you are offering this plea on the burglary first only—on the burglary first only, and you are prepared to admit the burglary in the first degree only and indicate to this Court that because of the possible exposure with regard to a trial and a possible conviction, that you are offering to plead also in that regard?"

The Defendant: "On the burglary, yes."

Did you understand that question and was that
your answer?

A Well, the exposure as I was told, would be trials in the order of the latest indictment first, which would not give me much of a defense and no defense at all.

I had no choice.

In other words, Mr. Harned, you felt that if you were to go to trial, the possibility of an extended sentence beyond what you were offered concerning this disposition was great?

A It was ridiculous.

So that you felt you would be convicted and that you would get a tremendous sentence, is that correct?

A . When one has no defense, he is going to be convicted.

And is that one of the main reasons that you took the plea?

A I was not under the impression that I had a choice as to which indictment came first.

? That's not my question.

A That was part of the consideration for taking the plea.

Q Please answer my question:

Now, you indicated you had no defense in this case?

A No. I said I had no defense if it was tried first.

Q Did you feel that if both indictments were tried, you would be convicted?

A No.

Q You did not?

A . I felt that if the first case was tried first,

I would be acquitted.

n Did you know which case was to be tried first?

A . I was under the impression that the second case would be tried first.

Q And you felt that in that case you would be

convicted, is that correct?

- A In that case, I had no defense.
- And did you know if you were convicted in that case alone, the exposure would be greater than it would be if you pled to the Class B felony, burglary in the first degree?
 - A I don't understand your question.
 - Q Well, let's go back a little.
 - A We are talking about which case first?
 - Q Mr. Harned, answer my question:

Did you plead guilty to burglary in the first degree because you felt that if the cases went to trial, you would go to jail for a longer period of time?

A . No. I felt that if the cases were tried in descending sequence, I would be convicted because I would have no defense for either case.

- Q And what did you feel the result would be if you were convicted?
 - A An extended incarceration.
 - Q Extended beyond a period of fifteen years?
 - A Possibly.
 - Q And is that the reason that you took the plea?

- A It is one of the reasons, yes.
- Q Do you attach any significance to that reason, any importance to it?
 - A Of course. It is a consideration.
- Q Mr. Harned, was it the most vital consideration that you had before you took the plea?
- A That I would be tried on the second case first giving me--
 - Q Mr. Harned--
 - A That is the consideration.

THE COURT: What difference does it make on what case you are tried first, what real difference does it make?

THE WITNESS: 'It makes a tremendous difference.

to me. I was under severe emotional stress at the

time of the first one and it was some kind of a defense

and if you give me the second case first, I have nothing

to prove, no way of proving that I didn't do anything.

THE COURT: You had been told that severe emotional stress is a defense to a burglary?

THE WITNESS: No, I have not.

THE COURT: You have been told that severe

emotional stress is a defense to a charge for rape?

THE WITNESS: Possibly.

THE COURT: Go ahead.

MR. SCARING: If I may just have a moment, your Honor. I had not an opportunity prior to the hearing to go through the minutes.

Q I ask you if you recall these questions being asked of you and whether or not you recall these answers on Page 8:

"The Court: On the 16th day of January, 1971, in the night time, did you enter and remain unlawfully in the dwalling house of a person by the name of Baer, located at 374 Stewart Avenue, Garden City, New York, Nassau County, with the intent to commit \alpha crime therein?"

"The Defendant: Yes, sir."

"The Court: Was there an attempt to commit the rape?"

"The Defendant: It was an intent."

"The Court: That's all I want to know, was there an intent to commit the crime of rape and was it at night? Let's start from the beginning:

Did you enter the house by reason of license or invitation?"

"The Defendant: The answer to the last question is yes."

"The Court: All right. So you went to the house unlawfully, is that correct?"

"The Defendant: Yes, sir."

Do you recall those questions, and do you recall those answers?

- A I would like to see that in writing please.
- Q Would you answer that question?

A I would like to see it in writing. You asked me three or four questions and I would like to see it in writing.

THE COURT: Let him see it.

- A I will answer one at a time.
- Q All right. That would be approximately the middle of Page 8, going into Page 9.
 - A Will you start from the beginning now?
- Q I am referring to your answer, "yes, sir", after the question which begins, "On the 16th day of January, 1971."

- A As I said before--
- Just answer my question, Mr. Harned. Did you give that answer to that question, yes or no?
 - A I gave that answer, yes, sir.
- Q With respect to the following question and the answer to that, "yes, sir", did you give that answer to that question?
 - A. I uttered that, yes.
- Q Mr. Harned, can I take that to mean that you gave that answer?
- A It is not my answer. It was told to me, it was advised to me, I was advised to say that.
 - Q Mr. Harned, did you say, "yes, sir", to that question or did you not say, "yes, sir", as your answer?
 - A I personally said, "yes, sir."
 - Thank you, Mr. Harned. The next question, "was there an attempt to commit the rape?"

"The Defendant: It was an intent."

Did you say that, Mr. Harned?

- A What I said there is not a statement. It is a question.
 - Q . Did you say it was an intent in response to

the Court's quastion:

"Was there an attempt to commit the rape?"

- A This goes back to the first question-
- Q Yes or no?
- A Did I say this?
- Q Yes.
- A I did say that, yes.
- Thank you. Going on to Page 9, Mr. Harned, the Court: "All right. So you went into the house unlawfully, is that correct?"

"The Defendant: Yes, sir."
Did you say that?

- A I did.
- Q "You had no invitation?"

"The Defendant: Yes, sir."

"The Court: It was night time?"

"The Defendant: Yes, sir."

"The Court: Did you know these people at all?"

"The Defendant: No, sir."

"The Court: So you went into a strange house at night, did you break through?"

"The Defendant: Yes, sir."

"The Court: How did you break in?"

"The Defendant: Through a window."

Do you recall those questions and answers?

- A I recall the questions, yes.
- And the answers, that I indicated were the answers that you gave to the Honorable Judge Altimari?
 - A They were not my answers, no.
 - Q Well, did someone else say those words?
 - A I was told to say those.
 - ? Who told you to say those?
 - A The attorney that was present.
 - Q . What's his name?
- A Joseph P. McCartney. He knew they were not right.
 - O He knew they were not right?
- A Yes. I was talking to him. The Judge was talking and I was talking to the attorney.
- O Did the Judge ask you if anybody threatened you or forced you to take this plea?
 - A I have not been threatened physically.
 - Q Did anybody force you to take this plea?
 - A Yes.
 - Q Who?

- A Well, if I had no money for attorneys and I couldn't fight it--
 - Q Answer my question:
 Who forced you to take this plea?
 - A Both parents and my attorney.
- Q Your deceased father and your mother and your attorney?
 - A Yes.
 - Q What was your attorney's name?
 - A Joseph P. McCartney and Richard Schultz.

THE COURT: Tell me, Mr. Harned, did you ever hear of the organization called Legal Aid Society?

THE WITNESS: I believe so.

THE COURT: Were you aware of the existence of the Legal Aid Society on the day you took the plea?

THE WITNESS: I had heard about it.

THE COURT: Were you aware of the fact that they were assigned counsel, that the Court would assign them in the event there was a defendant who could not afford counsel.

THE WITNESS: I had heard rumors in the jail about such counsel. That they were incompetent.

THE COURT: That they were what?

THE WITNESS: Incompetent.

THE COURT: All right.

- Q Mr. Harned, how long were you in jail prior to the time you took this plea?
 - A Since the 16th of January.
 - O Did you have conversations with other prisoners?
 - A Yes, sir.
 - Did you talk about cases?
 - A Yes.
 - Q Did you talk about lawyers?
 - A Yes.
 - You didn't know about the Legal Aid Society?
 - A · I heard about it, yes.
- Q Mr. Marned, on how many occasions did you discuss your case with your attorneys?
 - A I have no idea.
 - Q Well, was it more than five occasions?
 - A I couldn't say.
 - Was it more than ten occasions?
 - A I have no idea how many times.
 - So it could have been one hundred occasions

or it could have been one occasion, is that what your testimony is?

- A Yes.
- Q That's the best recollection you have?
- A I don't recall every time they saw me on it.
- Q I don't want you to remember every time. Just approximately?
- A Approximately, no. Five, maybe ten. I have no idea.
 - O More than five times?
 - A I would say yes, more than five times.
- Q All right. And would you say that these occasions were with both attorneys or just one attorney?
 - A Usually just one.
 - O All right. And would you discuss your case?
 - A Usually not.
 - Q Would you discuss--
- A We were going for a felony hearing and I knew nothing about a felony hearing.
- Q Well, they told you what a felony hearing was, didn't they?
 - A Well, it never came about.

- Did you know what the charges were against you?
- A Yes, I knew what the charges were.
- Did you know that you were charged with burglary and you knew what the other charges were that went along with that?
 - A Yes.
- Q You knew where you had committed these crimes, alleged crimes?
 - A Yes.
- Incidentally, you had mentioned to the Judge that you were in that house unlawfully, and are you telling this Court they were not true statements made by you in Court, those admissions.

THE COURT: Objection sustained.

- Q Were you in the house lawfully or unlawfully?
- A If you are going back to all these questions --
- Q Were you in the house lawfully or unlawfully?
- A I refuse to answer that question.
- Now, you indicated to me that both your parents and your lawyers have forced you to take this plea, is that correct?
 - A That's right, yes.

And I want you to tell me please, what each of your lawyers said to you that forced you to take this plea or did to you that forced you to take this plea?

MR. BOTTITTA: I object to that, your Honor.

THE COURT: Sustained.

MR. BOTTITTA: Privileged communication.

MR. SCARING: It seems to me we are talking about conclusions here.

THE COURT: We are also talking about rights which may be paramount to the issue before this Court which would be the confidential relationship between a lawyer and a client. I am not going to go into that. Gentlemen-

MR. SCARING: My point is simply, your Honor, the defandant here has indicated that he was forced to take this plea. Certainly he has taken a position now that we should be permitted to explore.

THE COURT: I think what his position is here is that he resisted taking a plea for a long period of time. He resisted on the day in question. He then had a conversation with his lawyer, he saw his mother crying, his deceased father was upset, he then

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had a talk with them then he changed his mind and he pled guilty. Hours later when he was alone and outside the influence of his parents and his lawyer, he said, "I want my trial." I think that's his position. I don't think there is any confusion here. There is no question of another Judge having taken the plea. I recall this case vividly. He answered all those questions. There is no need for you to elicit from him that he answered them. He admitted he went there and went there wrongfully, and he had no license to go there. And right down the line. I recall it clearly. I know that. There is no need to repeat that.

MR. SCARING: All right, your Honor.

No further questions, your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. BOTTITTA:

Q hr. Harned, you testified to the fact you have a high school education and a partial college education, is that right?

MR. BOTTITTA: One question.

A Yes.

Q Did you ever have any legal education of any kind?

A None.

MR. BOTTITTA: I have no other questions.

THE COURT: All right. You may step down.

(Witness is excused.)

THE COURT: Do either the People or the Defendant wish to offer anything else before this Court.

MR. BOTTITTA: Nothing further, your Honor.

MR. SCARING: If it please your Honor, the only evidence that the People would offer and I would ask to have it marked is the defendant's own prose pleading dated June 30th, 1971.

THE COURT: All right. That together with the Minutes will be before this Court.

MR. SCARING: And also the Minutes of the Hearing.

THE COURT: Yes. Both sides rest?

MR. BOTTITTA: Yes, your Honor.

MR. SCARING: The People rest.

THE COURT: All right.

im. SCARING: I take it your Honor is accepting both those?

THE COURT: Yes, they are before the Court one way or another. You have to assume that the Court has a memory and what happened at the time the plea was taken, the Court is aware of, and further that the Court reads its mail. All right. I will hear the District Attorney with regard to why they feel this plea should not be withdrawn.

here was, as I saw it framed, whether or not the defendant understood the proceedings that were before this Court. I think the defendant is a rather intelligent individual with an education, a high school and college education and he came across rather intelligently on the stand, I think, when I questioned him and I think when your Honor questioned him. I think we have to draw the line at this particular point. We have a man here who was thoroughly questioned by your Honor concerning whether or not he did commit the acts of this crime, whether or not he understood the nature and consequences of his taking a plea. Here's a man

who had the opportunity to consult with not just one lawyer, but two lawyers. And apparently two lawyers that were well paid and certainly there was an indication of that on the stand. He also had the opportunity to discuss this particular position and whether he should take a plea with his mother and his father. He also had the opportunity to talk to your Honor, he had the opportunity to listen to all the questions your Honor gave him.

I think there is very little doubt that he understood what he was doing. I think he just had a change of mind. And I don't think we can proceed on that basis. I don't think every time a defendant has a change of mind we should turn about the whole system and proceed along that particular whim that he has at that particular time. Certainly, a lot of time is spent by your Honor, a lot of time and effort was spent by a lot of people in this particular case. And we would oppose the application at this point.

I would also point out that the reason that I offered the pleading --

THE COURT: Let's assume I granted the defen-

dant's application. Do you have a preference as to which trial you would like to goon first?

MR. SCARING: I would like to leave that up to Mr. Straus.

THE COURT: Mr. Straus, do you know now?

MR. STRAUS: Do I have preference? I can only
go by what was said in the Minutes of the plea.

Apparently the People were ready to proceed, I believe,
on the latest indictment. I don't think anything has
changed in regard to that situation.

THE COURT: I will make it clear now. I am going to reserve decision. But it is going to be clear that if I grant the defendant's application, the People will choose which of the indictments they will try first. I think that's the least that this Court can do.'

MR. SCARING: Judge, I would make one further point, I think that the pleading of the defendant's prose application with respect to the reasons that he gave as to withdrawing his plea, differ substantially from the reasons he gave this Court today when I asked him those questions as to the withdrawing of

his plea. I don't think the defendant has established any basis for your Honor to grant his application and we would ask your Honor to deny his application.

Thank you.

THE COURT: Counsel?

MR. BOTTITTA: Your Honor, I don't want to belabor the point but I would just like to respect-fully remind your Honor of the decision of the People against Phipps which I cited in my memorandum in which the Court said upon the arraignment or sentencing, but before sentence is pronounced, defendant protested his innocence and moved to withdraw his prior plea of guilty.

THE COURT: Well, is there a protestation here of impocence, counsel?

MR. BOTTITTA: Yes.

THE COURT: Where?

MR. BOTTITTA: Even in the Minutes he denied being guilty of any charge with the possible exception of the burglary plea and now he tries to explain to your Honor by stating he didn't know what the elements were involved in the crime or the charge of burglary.

THE COURT: You think that's the kind of innocence that Court is referring to?

MR. BOTTITTA: Yes, I believe so.

THE COURT: That's almost technical innocence that dessn't fall within the complete rational? or purview of the burglary statute, burglary in the first degree; you think that's the kind of innocence that they are referring to in that decision?

MR. BOTTITTA: Yes, your Monor. Any protestation of innocence on the part of the defendant. He is protesting right now that he is not guilty of the charge of burglary.

THE COURT: Counsel, there is a difference between innocence and the position of not guilty. The difference is tremendous. Now, go shead.

MR. BOTTITTA: Well, he wouldn't know the difference, Judge.

THE COURT: I am addressing myself to you, then. Co shead.

MR. DOTTITTA: In any event, your Honor, the Court said that there is no claim of prejudice by the People. And there certainly is none in this case. And under the circumstances, the Court held in that particular case in view of the reasonable necessity of the time in which the defendant applied for the withdrawal of the plea and in view of the further fact that there is no prejudice on the part of the People, that it would be proper to grant this man's application for the withdrawal of the plea.

THE COURT: Counsel, is there any prejudice to the People?

MR. SCARING: I don't know, your Honor, because I haven't really had an opportunity to look into it.

THE COURT: Well, I am going to reserve decision. If after talking to your Trial Bureau you find that there is some prejudice because of this delay, I would suggest that you send a copy to me and a copy of whatever you send to me to counsel and then you can respond if you so desire.

IR. BCITITTA: Yes, sir.

THE COURT: Decision reserved.

MR. SCARING: Thank you, your Honor.

MR. BOTTITTA: May I make one other point because your Honor raised the particular point where

your Honor has indicated that if you see fit to grant the defendant's application for the withdrawal, you are going to leave it up to the District Attorney to try whichever case or charge he prefers, and, your Honor, I believe under the circumstances it would be unfair to this defendant to be tried on the second charge.

THE COURT: I really don't understand this.

I don't understand as to the first charge or second charge. Sooner or later all charges will be tried.

MR. BOTTITTA: Yes, your Honor, but the difference is very, very obvious here. On the first charge, the man feels he is completely innocent of the charge. Now, if he were tried on the first indictment and he were acquitted, they certainly couldn't use the incident of the first indictment against him on the second trial. But if he is tried on the second one, then his chances of getting a fair trial on the other charge would be very, very slim. He would be greatly prejudiced.

THE COURT: Well, counsel, believe me, if I grant your application, I will have exercised

the discretion which is not -- I am not inclined to do at this mement. And if I do so, and exercise this discretion, where everything on the face of the plea offering, the manner in which the Court conducted itself, the entire hearing, would indicate that your motion should be denied. And if I make a condition that the People try whichever of the three or two cases they want to, then I think that's a wonderful victory on your part.

on my part, your Honor. I say this very honestly.

I am concerned in knowing that the record will show that this man got a fair trial from beginning to end.

And I know your Honor has leaned over backwards.

THE COURT: He will get it.

MR. SCARING: Certainly the People have a right to move whatever case they feel is ready for trial for trial.

MR. BOTTITTA: Depending on the circumstances.

THE COURT: If you care to address yourself,

Mr. Scaring, with regard to prejudice and why you

should have--in the event the motion is granted--the

trial on whichever indictment you have in mind, then

say so in your letter and he will respond.

MR. DOTTITTA: Yes, sir.

MR. SCARING: Thank you very much, your Honor.

THE COURT: Decision reserved.

THE CLURK: Defendant remanded.

CERTIFIED AS A COMPLETE AND ACCURATE TRANSCRIPT.

Edward Arianas, C.S.R.

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COUNTY COURT — NASSAU COUNTY SPECIAL TERM: PART I

Present:

Hon FRANK X

FRANK X. ALTIMARI,

County Judge

Motion Cal. # C-1008 Indictment # 28586 31363

FORM N 80 - 5M - 5-70

PEOPLE OF THE STATE OF NEW YORK

-against-

HON. WILLIAM CAHN District Attorney Nassau County Mineola, New York

JOSEPH C. BOTTITTA, ESQ. Attorney for Defendant 56 School Street Glen Cove, New York 11542

EDWARD H. HARNED, JR.

Defendant

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause	
Supporting Affidavits	
Answering Affidavits	
Reply Affidavits	
Affidavits/Exhibits	
Filed Papers	
Br. s: People's Petitioner'sDefendant's Respondent's.	
The foregoing papers numbered 1 tohaving been read on th	is motion

This is a motion by the defendant for an Order granting leave to withdraw his plea of guilty. CPL §220.60 subd. 4. Pursuant to an Order of the court a hearing was held. People v. Dixon, 29 N.Y. 2d 55.

The following constitutes the court's findings of fact and conclusions of law:

On January 27, 1970 the Grand Jury indicted defendant for the crimes of Rape in the First Degree, Sodomy in the First Degree, Sexual Abuse in the First Degree and Assault in the Second Degree. (Ind. No.28586). On April 12, 1971 the Grand Jury indicted defendant for the crimes of Rape in the First Degree, Burglary in the First Degree and Possession of Burglars Tools. (Ind. No. 31363).

Subsequently, on June 23, 1971 the defendant withdrew his pleas of not guilty and entered a plea of guilty to the crime of Burglary in the First Degree under Indictment No. 31363 and in satisfaction thereof and

Exhibit I

Exhibit

in satisfaction of Indictment No. 28586.

On the day the plea of guilty was entered and prior to the entry of the plea the defendant conversed with his parents. This court finds that a factor in defendant's decision to plead guilty was that his parents had advised him that they could not afford additional legal fees. The Minutes of the Hearing to Withdraw the Plea of Guilty, dated October 29, 1971, reflect that the defendant was aware of the existence of the Legal Aid Society and that the court could assign it in the event he could not afford counsel. (SM p.30).

This court further finds that the defendant's retained attorneys discussed the case with him on at least five occasions and that the attorneys recommended the plea of guilty. (Minutes of Hearing to Withdraw Plea of Guilty, 10/29/71, p. 32). Thus, the Minutes of the Hearing to Withdraw the Guilty Plea and the Minutes of the Change of Plea, dated June 23, 1971 clearly demonstrate that there were repeated consultations between defendant and his lawyers, and a conference between defendant and his parents. Cf. People v. Robinson, aff'd sub nom People v. Nixon, 21 N.Y. 2d 338.

During the change of Plea on June 23, 1971, the defendant stated that he was pleading guilty of his own free will, that he was aware that he was entitled to a jury trial on each indictment, and that he knew he could examine and cross-examine witnesses at the trials. Defendant also admitted that he knowingly entered and remained unlawfully at the burglarized home in the night time and had the intent to commit the crime of rape. The defendant stated he had broken into the house through a window. See People v. Serrano, 15 N.Y. 2d 304.

On the other hand, at the Hearing to Withdraw the Plea of Guilty defendant stated his reasons for desiring to withdraw his guilty plea. He said he did not understand the meaning of the phrase "intent to commit a crime". (Minutes of Hearing to Withdraw Guilty Plea, 10/29/71 p.13-14).

During the Change of Plea proceeding on June 23, 1971 the following colloguy occurred:

The COURT: It is alleged here that the crime you intended to commit was rape. You understand that?

The DEFENDANT: Yes, sir.

The COURT: Was there an attempt to commit the rape?

The DEFENDANT: It was an intent. (SM p.8). Underlining supplied.

It should be noted that the defendant herein has had up to two years of college and is a computer programmer. He is intelligent and extremely articulate. The above-quoted minutes show that the defendant quickly stated that he <u>intended</u> to commit the crime of rape and thereby inferentially denied an <u>attempt</u> to rape.

Another reason for defendant's desire to withdraw his plea is based upon his belief that he is not guilty of any crime under Indictment Number 28586. (Hearing to Withdraw Guilty Plea, 10/29/71, p. 14.) However defendant pleaded guilty to the crime of Burglary in the First Degree under Indictment Number 31363. Such plea under Indictment Number 31363 did not constitute an admission of guilt under Indictment Number 28586.

It should be noted that the defendant believes that he is not guilty of any crime under Indictment Number 28586 because, as he stated, he was under severe emotional stress at the time the crimes were allegedly committed and that he was told that severe emotional distress was a possible defense to a charge of rape. The defendant did not state who gave such advice, but did say that no one told him that severe emotional stress was a defense to the crime of burglary. See Minutes of Hearing to Withdraw Guilty Plea, 10/29/71, p 24-25.

In any event, this court at the Change of Plea proceeding of June 23, 1971 elicited from the defendant that part of his consideration for the plea of guilty was that he knew that if convicted by a jury his possible exposure would be very severe, and could exceed the fifteen years maximum that the court had indicated previously. Minutes of Change of Plea Proceeding, 6/23/71, p. 13-14. People v. Serrano, 15 N.Y. 2d 304.

In <u>People v. Serrano</u>, supra, the defendant's version of the facts at the change of plea contained considerable and material differences from that set forth by the district attorney. The court there concluded that the trial court should have rejected the plea of guilty and then, if appropriate, inquire as to whether the guilty plea was based upon an attempt to avoid the risk of a jury verdict which might carry a more severe penalty.

In the case at bar, the defendant did not want to admit a forcible rape out of fear of the stigma which might attach. Thus, this court did not inquire during the Change of Plea proceeding whether the victim was physically injured during the commission of the crime of Burglary in the First Degree. The court, instead, immediately shifted its inquiry and continued as recommended in the Serrano case, supra.

North Carolina v. Alford, (400 U.S. 25) the Court held that an express admission of guilt was not a constitutional requisite to the imposition of sentence after a guilty plea, and a court may accept a guilty plea although a defendant does not admit guilt, but where strong evidence of guilt exists. Here, the defendant admitted all elements of the crime of Burglary in the First Degree except that of physical injury. The lack of inquiry with respect to physical injury was necessary in view of the position the defendant took and the defendant's desire to avoid the risk of a more severe penalty.

Finally, the defendant claimed that he pleaded guilty because he was told that the later indictment would be tried first. This court is not aware of any case of statute that requires that indictments be tried in the order they were handed up. In any event, even if the earlier indictment was tried first the defendant, if he testified, could have been

v. Alamo, 23 N.Y. 2d 630), or questimms concerning the underlying acts of his previous youthful offender conviction (People v. Vidal, 26 N.Y. 2d 249). Thus, the order in which the indictments were to be tried would not matter as defendant's credibility would be severely damaged if he testified.

This court, after reviewing the Minutes of the Change of Plea, the Minutes of Hearing to Withdraw the Guilty Plea, the letter of defendant dated June 30, 1971, the District Attorney's affidavit in opposition to the instant motion, and defense counsel's affirmation in support of the motion, concludes that the defendant's motion presents no legal grounds to permit a withdrawal of the plea of guilty. People v. Dixon, 29 N.Y. 2d 55.

This court is convinced that the defendant, an intelligent and articulate individual, and who, while just twenty-five years old, is somewhat familiar with criminal court proceedings, understood the proceedings held herein. Moreover, the court notes that the defendant has never claimed innocence under indictment number 31363.

It is

ORDERED that the defendant's motion is denied in all respects, and it is further

ORDERED that defendant will be sentenced on January 7, 1972

GKANTED	Sincy X Althona	
DATE: December 23, 1971	1	
HAROLD W. MCCONMELL	Jce	



SHORT FORM L DER

Tay

COUNTY COURT — NASSAU COUNTY
SPECIAL TERM: PART 1

Motion Cal. # C-2775 Indictment # 31365

4: 4

Present:

Hon

BLECARD TOUSON

County Judge

PEOPLE OF THE STATE OF NEW YORK

-against-

HOMARD H. HARNED, JR.,

HON. WILLIAM CAHN District Attorney Nassau County Mineola, New York

FUTARD HARNUD, JR., PRO 50 135 State Street Auburn, New York, 15022

Defendant

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause	
Supporting Affidavits	
Answering Affidavits	
Reply Affidavits	
Affidavits/Exhibits	
Filod Papers	
•	
Briefs: People's Petitioner'sDefence	iant's Respondent's
The foregoing papers numbered 1 tohav	

The defendant, pro se, applies to this court for an order vacating the judgment convicting him of Burglary in the First Degree on the ground that his plea of guilty was improperly obtained and upon his proopt request he should have been parmitted to withdraw it. (CPL 440.10 (subd. 1 (b) and (h))).

The defendant entered a plea of guilty to Eurglary in the Pirst Degree on June 23, 1971. Shortly thereafter the defendant applied to withdraw his plea. After a full hearing this application was denied. Court records indicate that an appeal was taken from this conviction in 1972. Thus, either the ground new raised was previously determined upon the merits upon such appeal (CPL 447.10 (subd. 2 (a))), or is currently appealable (CPL 440.10 (subd. 7(b))), or, although sufficient facts appeared upon the record to have

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EXHIBIT DJ

permitted review upon an appeal, the defendant unjustifiably failed to raise the issue (CFL 440.10 (subd. 2 (c))). In any event, this application must now be denied. (CPL 440.10 (subd. 2)).

ENTER

Therefore, the application is denied.
So O'COFELD.

NOV 18 1974

HAROLD W. Mc CONHELL

GOUNTY CLERA OF INJUSTIN

Dated November 14, 1974

PLEASE TAKE NOTICE THAT: The petitioner be and is hereby advised of his right to apply to the Appellate Division, Second Penartment for a cortificate granting leave to appeal from this determination and upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, petitioner may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Such application for poor person relief will be entertained only if, as and when such permission or certificate is granted. 224 NYCER Section 671.5.

Dated November 14, 1974

BEHMAND TOMON

JCC

lenger to Jan hopping

JCC

